

Statutory Formalities in South African Law

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DECLARATION

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

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SUMMARY

This dissertation examines the approach to statutory formalities in South African law. It focuses primarily on formal requirements which result in nullity in the event of non-compliance, and in particular, on those prescribed for alienations of land (section 2(1) of the Alienation of Land Act 68 of 1981) and suretyships (section 6 of the General Law Amendment Act 50 of 1956).

To provide context, the study commences with a general historical overview of the development of formal requirements. It also considers the advantages and disadvantages of formalities. The conclusion is reached that an awareness of both is required if a court is to succeed in dealing with the challenges posed by statutory formalities.

The dissertation then considers more specific aspects of the topic of formal requirements, including the difference between material and non-material terms. It also reveals that the current interpretation of statutory formalities is quite flexible and tends towards a conclusion of validity if reasonably possible. However, cases involving unnamed or undisclosed principals present particular challenges in this context, and the possibility of greater consistency, without the loss of theoretical soundness, is investigated.

A discussion of what should be in writing, and with what exactitude, necessarily involves a consideration of the extent to which extrinsic evidence is admissible. The interaction between formal requirements and the parole evidence rule is therefore investigated. Special attention is paid to incorporation by reference. After an examination of the common-law approach to this topic, the conclusion is reached that room exists for developing this area of South African law, especially where a sufficient reference to another document is concerned.

Rectification also enjoys detailed examination, due to the unique approach adopted in South African law. Where formalities are constitutive, a South African court first satisfies itself that a recordal complies with these requirements *ex facie* the document, before it will consider whether rectification may be appropriate. An analysis of both civilian and common-law judgments suggests that the South African approach is based on a misconception of the purpose of rectification. This leads to the further conclusion that the

requirement of *ex facie* compliance should be abolished as a separate step and that a court should rather consider whether awarding a claim for rectification would defeat the objects of formalities in general.

Finally, the remedies available to a party who performs in terms of an agreement void for formal non-compliance and the effect of full performance in terms of such an agreement, receive attention. An investigation of the remedies available in other legal systems reveals that the South African approach of limiting a party to an enrichment claim is unnecessarily restrictive. It is argued that local courts should reconsider their exclusion of estoppel in this context, particularly in cases where one party's unconscionable conduct has led the other to rely on the formally defective agreement. In cases of full performance, no remedies are available, but it is argued that a distinction should be drawn between reciprocal and unilateral performances.

OPSOMMING

Hierdie proefskrif ondersoek die benadering tot statutêre formaliteite in die Suid-Afrikaanse reg. Dit fokus hoofsaaklik op die formele vereistes wat lei tot nietigheid in die geval van nie-nakoming, en in die besonder dié wat voorgeskryf word vir die vervreemding van grond (artikel 2 (1) van die Wet op Vervreemding van Grond 68 van 1981) en borgstellings (artikel 6 van die Algemene Regswysigingswet 50 van 1956).

Ten einde die nodige konteks te verskaf, begin die studie met 'n algemene historiese oorsig van die ontwikkeling van formaliteite. Dit oorweeg ook die voor- en nadele van formaliteite. Die gevolgtrekking is dat 'n bewustheid van beide vereis word indien 'n hof die uitdagings wat deur statutêre formaliteite gestel word, suksesvol wil hanteer.

Die proefskrif oorweeg dan meer spesifieke aspekte van formaliteite, insluitende die verskil tussen wesenlike en nie-wesenlike bedinge. Dit toon ook dat die huidige opvatting van statutêre formaliteite redelik buigsaam is en tot 'n bevinding van geldigheid lei waar dit redelikerwys moontlik is. Gevalle van onbenoemde of versweë prinsipale bied egter besondere uitdagings in hierdie verband en die moontlikheid word ondersoek om 'n meer konsekwente, maar tegelyk teoreties-gefundeerde benadering te volg.

'n Bespreking van wat op skrif moet wees, en met watter mate van sekerheid, behels noodwendig 'n oorweging van die mate waarin ekstrasieë getuieis toelaatbaar is. Die interaksie tussen formaliteite en die *parol evidence*-reël word derhalwe ondersoek. Spesiale aandag word bestee aan inlywing deur verwysing. Na oorweging van die benadering in gemeenregtelike stelsels, word die gevolgtrekking bereik dat ruimte bestaan vir ontwikkeling op hierdie gebied, veral met betrekking tot 'n voldoende verwysing na 'n ander dokument.

Rektifikasie word ook breedvoerig hanteer, vanweë die eiesoortige benadering in die Suid-Afrikaanse reg. Waar formaliteite konstitutief van aard is, sal 'n Suid-Afrikaanse hof eers vasstel dat 'n ooreenkoms *ex facie* die dokument aan die formaliteite voldoen, voordat dit sal oorweeg of rektifikasie moontlik is. 'n Ontleding van sivielregtelike en gemeenregtelike beslissings dui daarop dat die Suid-Afrikaanse benadering op 'n wanbegrip van die doel van rektifikasie gebaseer is. Dit lei tot die verdere gevolgtrekking dat die vereiste van *ex*

facie nakoming as 'n afsonderlike stap afgeskaf behoort te word en dat 'n hof eerder moet oorweeg of die toestaan van 'n eis vir rektifikasie die oogmerke van die formaliteite in die algemeen sou verydel.

Laastens word aandag geskenk aan die remedies beskikbaar aan 'n party wat presteer ingevolge 'n ooreenkoms wat nietig is weens nie-nakoming van formaliteite, asook die effek van volle prestasie kragtens so 'n ooreenkoms. In eersgenoemde geval beperk die Suid-Afrikaanse reg daardie party tot 'n verrykingseis. 'n Ondersoek van die remedies beskikbaar in ander regstelsels toon dat dit onnodig beperkend is. Dit word aangevoer dat Suid-Afrikaanse howe die uitsluiting van estoppel in hierdie konteks moet heroorweeg, veral in gevalle waar een party se gewetenlose optrede daartoe lei dat die ander party staat maak op die formeel-gebrekkige ooreenkoms. In gevalle van volledige prestasie is daar geen remedies beskikbaar nie, maar dit word aangevoer dat 'n onderskeid getref moet word tussen wedersydse en eensydige prestasies.

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LIST OF ABBREVIATIONS

Alienation of Land Act	Alienation of Land Act 68 of 1981
Am J Comp L	American Journal of Comparative Law
Arch Sci	Archival Science
ASSAL	Annual Survey of South African Law
BGB	<i>Bürgerliches Gesetzbuch</i>
Can Bar Rev	Canadian Bar Review
CLOSA	Constitutional Law of South Africa
CLSR	Computer Law & Security Report
Colum LR	Columbia Law Review
Conv	Conveyancer and Property Lawyer
DJ	De Jure
DULJ	Dublin University Law Journal
Edin LR	Edinburgh Law Review
Fordham LR	Fordham Law Review
General Law Amendment Act	General Law Amendment Act 50 of 1956
Harv LR	Harvard Law Review
HGB	<i>Handelsgesetzbuch</i>
Int Enc Comp L	International Encyclopedia of Comparative Law
J Legal Stud	Journal of Legal Studies

JBL	Juta's Business Law
JQR	Juta's Quarterly Review of South African Law
KLJ	King's Law Journal
Law of Property (Miscellaneous Provisions) Act	Law of Property (Miscellaneous Provisions) Act 1989
LAWSA	Law of South Africa
LQR	Law Quarterly Review
NJW	Neue Juristische Wochenschrift
NJW-RR	Neue Juristische Wochenschrift – Rechtsprechungs-Report Zivilrecht
MB	Modern Business Law
OJLS	Oxford Journal of Legal Studies
RNLJ	Rhodesia & Nyasaland Law Journal
SA Merc LJ	South African Mercantile Law Journal
SALJ	South African Law Journal
SLR	Sydney Law Review
Stell LR	Stellenbosch Law Review
Statute of Frauds	Statute of Frauds 1677
THRHR	Tydskrif vir Hedendaagse Romeins- Hollandse Reg / Journal of Contemporary Roman-Dutch Law
TM	The Magistrate

TSAR	Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law
U Pa LR	University of Pennsylvania Law Review
UNSW LJ	University of New South Wales Law Journal
UTLJ	University of Toronto Law Journal
WALR	Western Australian Law Review
Yale LJ	Yale Law Journal
ZIP	Zeitschrift für Wirtschaftsrecht

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CHAPTER 1: INTRODUCTION

1 1 Problem identification

For more than a century, various South African statutes have prescribed formal requirements for certain types of agreements.¹ Despite the lengthy time period in which to solve the difficulties surrounding the interpretation of these statutes or their successors, recent case law reveals that the passage of time has not minimised the disputes which may arise when an agreement is subject to statutory formalities. For example, in *Exdev (Pty) Ltd v Pekudei Investments (Pty) Ltd*² ("Exdev") Leach JA made the following general remarks about section 2(1) of the Alienation of Land Act:

"[T]he section ... was designed to promote certainty, and to avoid disputes, litigation and possible malpractice. Unfortunately, history has proved it to be fertile ground for litigation, the law reports being replete with decisions concerning the validity of deeds of sale of land. Consequently, it has been remarked that the section has failed to achieve its objectives, and it has indeed correctly been observed that, reading between the lines, the section is often abused, in particular 'by unscrupulous sellers who regret having sold the property at the price they did and then try to rescind the contract because of non-compliance with the technical formality requirements of the Act'. This comment is not without substance, but it may be somewhat unfair. Human nature being what it is, there may well have been many more disputes arising out of the sale of land, had no formalities been required ... Be that as it may, this is another case in which a seller of immovable property alleges that the sale is void for non-compliance with the section."³

This quotation highlights important aspects of the topic of statutory formalities. First, it touches upon the notion that formal requirements have advantages and disadvantages. A requirement that an agreement should be in writing and contain certain information

¹ Eg ss 1 and 2 of Law 12 of 1884 (Natal) imposed formal requirements for certain transactions, including sales of land and suretyships. S 17 of Law 20 of 1895 (ZAR) also imposed formalities for sales of land. At the turn of the 20th century, s 30 of Proclamation 8 of 1902 (Tvl) and s 49 of Ordinance 12 of 1906 (OFS) stated that sales of land should be in writing. Eventually, formalities were prescribed throughout South Africa for both sales of land (s 1(1) of the General Law Amendment Act 68 of 1957, the eventual successor of which was s 2(1) of the Alienation of Land Act) and suretyships (s 6 of the General Law Amendment Act 50 of 1956).

² 2011 2 SA 282 (SCA).

³ Paras 1-2 (footnote omitted).

promotes certainty and reduces disputes. However, the very same requirement can be abused by a party who does not wish to be bound by an agreement which was seriously intended. As stated in *Senekal v Home Sites (Pty) Ltd*:⁴

“On sudden and unforeseen appreciation of the value of land, the subject-matter of executory contracts of sale, there has been evinced a marked tendency on the part of vendors of such land to seek with a jaundiced eye in the deed of sale for technical points which might justify, under colour of the requirements of sec. 30 [of Proclamation 8 of 1902], a repudiation of sales of land duly entered upon in written deeds of sale.”⁵

This suggests secondly, that compliance with formal requirements involves the (possibly mechanical) application of certain rules to determine whether an agreement is enforceable or not, irrespective of the merits of a particular case.

However, Leach JA does not allude to the fact that statutory formalities have implications for other areas of South African contract law as well as other areas of the law in general. For example, it was held in *Magwaza v Heenan*⁶ that an agreement which on the face of it did not comply with formal requirements could not be rectified, in spite of the fact that the apparent invalidity was due to a mistake in the recordal of the agreement. This rule does not apply when a written agreement appears to be invalid, *ex facie* the document, for a reason not related to formalities,⁷ and the question arises whether the special treatment of formal requirements is justified. The same question arises in the context of estoppel: a party may not raise this defence against another who maintains that the agreement is formally defective, but who created the impression earlier that he would abide by it.⁸ It is irrelevant if the latter has behaved in an unconscionable manner. Again, it is debatable

⁴ 1950 1 SA 139 (W).

⁵ *Senekal v Home Sites (Pty) Ltd* 1950 1 SA 139 (W) 150 per Dowling J. It is not only sellers who resort to the “technical” defence of formal non-compliance – “[t]he same holds true for purchasers looking for a loop-hole through which to withdraw from a contract about which they later have their doubts.” (D J Lötze & C J Nagel “*JR 209 Investments (Pty) Ltd & Another v Pine Villa Country Estate (Pty) Ltd* case no 617/2007 (SCA); *Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd* case no 2/2008 (SCA)” 2010 *DJ* 169 174.

⁶ 1979 2 SA 1019 (A) 1028A-C.

⁷ See eg *Spiller v Lawrence* 1976 1 SA 307 (N) 312B-D; *Headerman (Vryburg) (Pty) Ltd v Ping Bai* 1997 3 SA 1004 (SCA) 1010D-H.

⁸ *Trust Bank van Afrika Bpk v Eksteen* 1964 3 SA 402 (A) 411H.

whether formal requirements dictate that the innocent party may not raise estoppel in such circumstances.

In other areas of the law, the policy considerations underlying the imposition of formal requirements do not always enjoy supremacy. The recent decision in *Legator McKenna Inc v Shea*⁹ shows that in the context of full performance of formally defective agreements, these considerations may be trumped by other values, so that full performance cures the defect in form retrospectively and a party may not reclaim his performance with an enrichment remedy. The question then becomes whether full performance should always have this curative effect, irrespective of whether one is dealing with reciprocal or unilateral performances and regardless of the fact that different types of policy considerations may underlie different types of formal requirements.

1 2 Purpose of the dissertation, research questions and methodology

In view of the preceding discussion, this dissertation aims to consider the current approach to statutory formalities in South African law. Available material is often outdated (although not irrelevant), cursory in its treatment, or focuses on only one aspect of the topic. It is an underlying assumption that a comprehensive understanding of the South African approach cannot be achieved solely by examining how courts interpret legislation imposing formal requirements. For this reason, the study also considers the interaction between formalities and other legal phenomena, like the parole evidence rule, rectification and the remedies which may become available in the event of non-compliance with formal requirements. Finally, and especially because South Africa is a mixed legal system,¹⁰ the dissertation has a comparative dimension: the strengths and weaknesses of the South African approach to statutory formalities can only be evaluated properly by comparing it to other legal systems. Comparisons are drawn primarily with English law (as representative of a common-law system) and German law (as a typical example of a civilian system). Any solutions that

⁹ 2010 2 SA 35 (SCA) para 28.

¹⁰ A full account of the factors contributing to the “mixed” nature of the SA legal system is provided by E Fagan “Roman-Dutch Law in its South African Historical Context” in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* 33. See also C G van der Merwe, J E du Plessis, M J de Waal, R Zimmermann & P Farlam “The Republic of South Africa” in V Palmer (ed) *Mixed Jurisdictions Worldwide* (2012) 95.

may become apparent in the course of this comparison will be considered carefully in order to determine whether they are suitable for adoption in South Africa.

Four research questions have been identified, and these serve as the focal points for the chapters which follow:

- (i) What role do formalities fulfil in the law of contract generally?¹¹
- (ii) How do courts interpret and apply the formal requirements set by various statutes and is such interpretation consistent?¹²
- (iii) What is the interaction between the parol evidence rule, statutory formalities and the admission of extrinsic evidence?¹³
- (iv) What remedies, if any, are available to parties if their agreement does not comply with statutory formalities?¹⁴

Before turning to the limitations on the scope of this dissertation, two observations must be made. First, there is no general concluding chapter to this study. The South African approach to statutory formalities is examined within several different contexts, each of which generates specific problems and requires specialised treatment. Each chapter therefore ends with its own concluding section, summarising the problems identified and containing recommendations for development. Secondly, while formalities may have their disadvantages, they do have a role to play in the law of contract, as will become apparent in the next chapter. Therefore, this study does not suggest that formalities should be abolished. Its goals are more modest: the emphasis is on the need to clarify, and in certain cases to reform, specific aspects of the South African approach to statutory formalities.

¹¹ Ch 2.

¹² Ch 3.

¹³ Ch 4 (statutory formalities and the parol evidence rule in general) and ch 5 (rectification).

¹⁴ Ch 6.

1 3 Limitations on the scope of the dissertation

1 3 1 The types of transactions considered

The dissertation focuses primarily on formalities imposed for suretyships and sales of land (which constitute one example of an alienation of land falling within the scope of the Alienation of Land Act¹⁵), although references to other transactions subject to formalities are occasionally made to illustrate certain points. This limited focus is based on a number of factors. First, these transactions are the most commonly encountered, commercially important examples of agreements subject to formalities. Secondly, the relevant statutes (or their predecessors) are some of the oldest examples of formal requirements.¹⁶ The case law surrounding the interpretation of these statutes affords the opportunity to examine both the origins and the development of the rules relating to statutory formalities. Thirdly, both section 2(1) of the Alienation of Land Act and section 6 of the General Law Amendment Act are particularly vague in their formulation – neither, for example, specifies exactly what should appear in the written agreement or with what degree of completeness.¹⁷ An examination of judicial decisions in this regard therefore has the benefit of providing a perspective on curial attitudes to formal requirements and their functions. Finally, non-compliance with these requirements results in invalidity. As we shall see in subsequent chapters, this consequence may limit a party's right to claim that the written agreement should be rectified and the remedies which are available to him when he has performed in terms of a formally invalid agreement. Similarly drastic consequences are not evident where non-compliance results in voidability.¹⁸

¹⁵ Other examples of "alienations" are contracts of exchange and donations of land (s 1).

¹⁶ More recent examples are provided in s 93 of the National Credit Act 34 of 2005 and s 7 of the Consumer Protection Act 68 of 2008 (see also s 50 which provides that the Minister of Trade and Industry may prescribe that certain categories of consumer agreements must be reduced to writing; this has not yet been done).

¹⁷ By contrast, see eg the detailed exposition of what should appear in a written agreement for the sale of land on instalment in ch 2 of the Alienation of Land Act (see Addendum A and ch 3 (3 2 2)).

¹⁸ As it does in terms of s 93 of the the National Credit Act 34 of 2005 (a credit provider must provide the consumer with a written copy of the credit agreement).

1 3 2 The electronic conclusion of agreements subject to formalities

Beyond what is said here, this dissertation does not consider the electronic conclusion of agreements subject to formal requirements. The reasons for this exclusion will become apparent further in the main text.

Section 12 of the Electronic Communications and Transactions Act 25 of 2002 (“ECTA”) provides that the requirement that a document be in writing is met if such document is in the form of a data message and accessible in a manner usable for subsequent reference.¹⁹ Section 13 further provides that where the relevant law also requires that such a document be signed, but makes no provision for the type of signature, this requirement is only satisfied if an advanced electronic signature (also known as a digital signature) is used.²⁰ It is therefore possible that any agreement subject to formalities, at least in theory, could be concluded electronically. However, section 4(4) read with schedule 2 of ECTA excludes alienations of immovable property, long-term leases of immovable property, wills or bills of exchange from the ambit of its provisions.²¹ Of the two transactions on which this dissertation primarily focuses, these provisions leave only suretyships as capable of electronic conclusion.

By prescribing that only a digital signature suffices to authenticate an electronic suretyship agreement, ECTA imposes a stricter signature requirement than is found with paper-based documents.²² A digital signature employs a pair of keys – a private key kept by and known only to the sender to encrypt the message and a public key available to members of the

¹⁹ A data message is any data “generated, sent, received or stored by electronic means” (s 1).

²⁰ An electronic signature means data “attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature”; an advanced electronic signature is a signature which meets these requirements and which, in addition, has been created by a process accredited by an Accreditation Authority (s 1).

²¹ The SA Law Reform Commission has recently questioned whether these exclusions should be removed from the Act – see *Issue Paper 27 (Project 126) Review of the Law of Evidence (Electronic Evidence in Criminal and Civil Proceedings: Admissibility and Related Issues)* (2010) 35 < http://salawreform.justice.gov.za/ipapers/ip27_pr126_2010.pdf > (accessed 12-11-2012). For criticism of the current exclusion of alienations of land, see S W J van der Merwe, L F van Huyssteen, M F B Reinecke & G F Lubbe *Contract: General Principles* 4 ed (2012) 143-146.

²² See ch 3 (3 4 2).

public to decode the message.²³ Authentication products and services designed for the creation of digital signatures must be accredited by the Department of Communications (the Accreditation Authority in South Africa). Such accreditation will only be granted if the advanced electronic signature

- “(a) is uniquely linked to the user;
- (b) is capable of identifying that user;
- (c) is created using means that can be maintained under the sole control of that user; and
- (d) will be linked to the data or data message to which it relates in such a manner that any subsequent change of the data or data message is detectable”.²⁴

Digital signatures therefore appear to provide a greater degree of certainty as to the identity of the particular person who sent the electronic communication and the integrity of the document, thereby minimising the risk of fraud and unnecessary litigation to a greater degree than is the case with paper-based signatures.²⁵ However, there is no case law which supports or rejects this conclusion. This is hardly surprising, since the Department of Communications has only granted accreditation to the authentication products of one company by late 2011.²⁶

The absence of judicial pronouncements is one reason why this dissertation does not engage with the topic of the electronic conclusion of agreements subject to formalities in

²³ Van der Merwe et al *Contract* 145 n 123; M H M Schellekens *Electronic Signatures: Authentication Technology from a Legal Perspective* (2004) 77-78.

²⁴ S 38.

²⁵ M Wang “Do the Regulations on Electronic Signatures Facilitate International Electronic Commerce? A Critical Review” (2007) 23 *CLSR* 32 32-33; I Lloyd “Legal Barriers to Electronic Contracts: Formal Requirements and Digital Signatures” in L Edwards & C Waelde *Law and the Internet: Regulating Cyberspace* (1997) 137 142. It is debatable whether these types of signatures can fulfil certain other functions of formalities, like serving to warn a party of the potentially onerous obligation which he is about to undertake if he signs a suretyship – see Schellekens *Electronic Signatures* 79. In German law, it is thought that this cautionary function is not fulfilled by means of an electronic signature and therefore suretyships may not be concluded electronically there (see § 766 BGB and the commentary provided in M Habersack “§ 766” in M Habersack (ed) *Münchener Kommentar zum Bürgerlichen Gesetzbuch 5 Besonderer Teil III: §§ 705-853* 5 ed (2009) n 1). See the discussion in ch 3 (3 4 2) on what suffices as a handwritten signature.

²⁶ See the address to the 7th ITWEB Security Summit on 16 May 2012 by Deputy Minister of Communication, Stella Ndabeni-Abrahams. The speech is available at <http://www.doc.gov.za/index.php?option=com_docman&task=cat_view&gid=69&Itemid=104> (accessed 01-11-2012).

subsequent chapters. More importantly however, it is argued that the principles applicable to paper-based agreements would, as a general rule, also be applicable to electronic agreements. For example, compliance with formal requirements imposed for suretyships means that the document must contain certain terms, the content of which is sufficiently certain that a court does not need to consider evidence regarding the parties' negotiations or oral consensus.²⁷ This rule will be applicable irrespective of whether the document is paper-based or electronic. Similarly, extrinsic evidence will be excluded if it varies or contradicts the agreement, whether written or in electronic form.²⁸ It is not the format in which these agreements appear which dictates the applicability of the rules, but the fact that the agreements are subject to formal requirements. As a result, an additional chapter on the electronic conclusion of agreements would be redundant because it would simply repeat arguments made in the context of paper-based agreements in any event.

1 3 3 The constitutionality of statutes prescribing formal requirements

This dissertation also does not consider the constitutional implications of statutory formalities. Again, there are no judicial pronouncements on the topic. However, while the absence of case law in the context of electronic suretyships may be explained by practical considerations, it is not immediately apparent why there is no case in which a party has challenged the constitutionality of a statute imposing formal requirements and prescribing nullity in the event of non-compliance. Such a challenge would require a court to engage in a two-stage analysis.²⁹ In the first stage, it would need to be determined whether a fundamental right in the Bill of Rights contained in the Constitution of the Republic of South Africa, 1996 ("the Constitution") is limited by such a statute. In the second stage, assuming that a fundamental right has been infringed or limited, a court would need to consider whether the limitation is reasonable and justifiable in terms of section 36(1) of the Constitution.

²⁷ See ch 3.

²⁸ See ch 4.

²⁹ S Woolman & H Botha "Limitations" in S Woolman, M Bishop & J Brickhill (eds) *CLOSA 2* 2 ed (RS 4 2012) 34-3-34-6.

It is a general principle of contract law that an agreement between parties need not be cast in a particular form in order to constitute a valid and enforceable contract.³⁰ Therefore, a statute which requires that parties must evidence their consensus in writing upon pain of nullity is self-evidently a restriction of a party's right to contractual autonomy and for this reason, limits a party's right to dignity protected in section 10 of the Bill of Rights. In *Barkhuizen v Napier*,³¹ Ngcobo J remarked that

"[s]elf-autonomy, or the ability to regulate one's own affairs ... is the very essence of freedom and a vital part of dignity."³²

The limitation of a specific right in the Bill of Rights means that a challenge to the constitutionality of the statutory formalities under consideration is one which involves the direct application of the Bill in terms of section 8(1):³³

"It seems obvious that when a statute's constitutionality is challenged, appropriately, in a dispute between private persons, the [c]ourt ... will not hesitate to apply provisions of the Bill of Rights directly. It will not even consider submitting the law at issue to the 'test' set out in ... [section] 8(2)."³⁴

In other words, such a challenge would not run into the difficulties traditionally associated with determining whether a right contained in the Bill of Rights applies directly against a private party in a contractual dispute.³⁵

³⁰ See eg Van der Merwe et al *Contract* 129.

³¹ 2007 5 SA 323 (CC).

³² *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 57. See also S Woolman "Dignity" in S Woolman, M Bishop & J Brickhill (eds) *CLOSA* 3 2 ed (RS 4 2012) 36-11-36-13 on the self-actualisation and self-governance dimensions of the right to dignity.

³³ The section provides: "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

³⁴ S Woolman "Application" in S Woolman, M Bishop & J Brickhill (eds) *CLOSA* 2 2 ed (RS 4 2012) 31-50. See also I M Rautenbach "Introduction to the Bill of Rights" in Y Mokgoro & P Tlakula (eds) *Bill of Rights Compendium* (1998 SI 29) 1A-69.

³⁵ See eg *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 23-26. A challenge to a common-law rule relating to statutory formalities - eg the rule that an agreement which is void for formal non-compliance cannot be rectified - should also invoke the direct application of the Bill of Rights in terms of s 8(1). Rautenbach "Introduction" in *Rights Compendium* 1A-69, 1A-78; Woolman "Application" in *CLOSA* 2 31-45. Both authors criticise *Khumalo v Holomisa* 2002 5 SA 401 (CC) paras 31-32 for suggesting that s 8(1) does not apply to the common law, because the judgment ignores the wording of s 8(1) which states that it applies to "all law"

Once a court is satisfied that a fundamental right has been limited, it must engage in a limitations analysis in terms of section 36(1):

“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”

At its core, section 36(1) constitutes an investigation into proportionality:³⁶ it requires a court to determine whether a statute’s limitation of a particular right is proportionate to the purpose served by that statute.³⁷ It is suggested that the probable reason for the paucity of case law on the constitutionality of statutory formalities is because South African courts have implicitly concluded that the limitation of contractual autonomy is proportionate to the purpose served by formalities.

For example, it was recognised early in the 20th century in South African law that the purpose of formal requirements imposed for alienations of land is to prevent fraud and perjury, and that this purpose is in the public interest.³⁸ The same purpose underlies

(Rautenbach “Introduction” in *Rights Compendium* 1A-69-1A-70; Woolman “Application” in *CLOSA* 2 31-43-31-44).

³⁶ Woolman & Botha “Limitations” in *CLOSA* 2 34-71, 34-93. In *S v Makwanyane* 1995 3 SA 391 (CC) para 104, the court identified the factors implicit in an assessment of proportionality in terms of s 33(1) of Constitution of the Republic of South Africa Act 200 of 1993 (the Interim Constitution). These factors were made explicit in s 36(1) of the final Constitution.

³⁷ Although the main text only focuses on a limitations analysis where a statute’s constitutionality is challenged, it should be pointed out that a limitations analysis would be equally applicable if the constitutionality of a common-law rule surrounding statutory formalities were challenged (see n 34), because such a rule also constitutes a law of general application. Woolman & Botha “Limitations” in *CLOSA* 2 34-51-34-52; *S v Thebus* 2003 6 SA 505 (CC) para 65.

³⁸ *Wilken v Kohler* 1913 AD 135 142, 149.

formal requirements imposed for suretyships.³⁹ While it may not always be achieved with equally great success, it is evident in the quotation from the *Exdev* case that the Supreme Court of Appeal is of the opinion that these formalities have probably prevented more disputes than they have created, precisely because they reduce the possibility of fraudulent allegations.⁴⁰ This suggests that South African courts are satisfied (even if only by implication) that the limitation of contractual autonomy and therefore the right to dignity by a statute imposing formal requirements upon pain of nullity is reasonable and justifiable. This suggests further that a litigant who seeks to challenge the constitutionality of such a statute would in all likelihood fail.

The notion that contractual autonomy can be limited by formal requirements which serve a legitimate purpose is not novel. This will become apparent in the next chapter, which considers the role of formalities and their historical development in greater detail.

³⁹ *Fourlamel (Pty) Ltd v Maddison* 1977 1 SA 333 (A) 343A; *Intercontinental Exports (Pty) Ltd v Fowles* [1999] 2 All SA 304 (A) para 9.

⁴⁰ See 1 1 above.

CHAPTER 2: THE ROLE OF FORMALITIES IN CONTRACT LAW

2 1 Introduction

The aim of this chapter is to examine the functions of formalities in the law of contract. While subsequent chapters will consider formalities in greater detail like what should be in writing,¹ the relationship between formalities and the admission of extrinsic evidence,² and the remedies available to parties in the case of non-compliance with statutory formalities,³ the current chapter will operate at a more abstract level, providing the background and justification – both historical and jurisprudential – for formalities in general.

The purpose of such an examination is to provide a means by which to evaluate the judicial treatment of formalities as discussed in subsequent chapters. While any judgment can be rated for legal soundness, decisions relating to formal requirements should also be evaluated on the basis whether they promote the policy considerations underlying their imposition: while form has certain advantages, it also has negative consequences which may undermine those policy considerations. A proper evaluation must take both aspects into account, so that a court's approach to a particular set of facts in which formalities are at issue can be assessed properly.

Before turning to a consideration of the advantages and disadvantages of form, the focus will be on a brief historical background to legislation imposing statutory formalities, in order to determine whether it is possible to find historical justification for their imposition.

2 2 Historical development of formalities

Form has been described as the oldest norm.⁴ For example, there are references in the Bible to placing the hand under another's thigh⁵ and to putting an awl through a slave's

¹ Ch 3.

² Chs 4 and 5.

³ Ch 6.

⁴ R Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 82.

⁵ *Genesis* 24: 2-3.

ear, as necessary to render a promise binding.⁶ The *sponsio* of Roman law was valid because it was performed in a temple and accompanied by an oath to a Roman god or goddess.⁷ Symbolic acts also appeared in Germanic customary law: a transfer into household service was represented by the handing over of a lock of hair from the head and beard, while the transfer of ownership was symbolised by the delivery of a hat or glove.⁸ In Anglo-Saxon law, the oath (*juramentum*⁹), the hand-grasp (*on hand syllan*) or the pledge of good faith (*trȳwa*) were regarded as prerequisites for the validity of contracts which were not *in rem*¹⁰ and in medieval English common law, one type of transfer of land had to be accompanied by the handing over of a sod of turf and a twig.¹¹

Over time, the equation of these symbolic acts or ritual words with legal acts disappeared as a result of two conflicting developments: the increasing use of written documents to record transactions¹² and the Canon law idea that informal agreements should be binding.¹³ While the latter development came to dominate the modern law of contract, the former eventually culminated in one of the earliest legislative acts to impose formalities on certain types of transactions, namely the Statute of Frauds of 1677.¹⁴

⁶ *Deuteronomy* 15: 12-17.

⁷ Zimmermann *Law of Obligations* 71-72. The binding force of the *stipulatio*, at least in its original form, can be traced back to the fact that it was based on *sponsio*:

“[O]ne can well imagine that many Romans still sensed certain oath-like connotations when using the word ‘spondeo’ at a time when all sacral effects and sanctions had long fallen away.” (71).

⁸ A Heusler *Institutions of Germanic Private Law I* (1885), cited in J H Chadbourn *Evidence in Trials at Common Law by John Henry Wigmore* 9 (1981) § 2400.

⁹ The original Anglo-Saxon word cannot be reproduced electronically.

¹⁰ H D Hazeltine “The Formal Contract of Early English Law” (1910) 10 *Colum LR* 608 609; J Perillo “The Statute of Frauds in the Light of the Functions and Dysfunctions of Form” (1973-1974) 43 *Fordham LR* 39 65.

¹¹ H MacNeil “From the Memory of the Act to the Act Itself. The Evolution of Written Records as Proof of Jural Acts in England, 11th to 17th Century” (2006) 6 *Arch Sci* 313 315.

¹² This development was already apparent in Roman law. See Zimmermann *Law of Obligations* 78-82 for a discussion of the gradual conversion of the oral *stipulatio* into a written contract. By contrast, the only contract for which writing was originally required in Roman law - the *contractus litteris* (which could create a debt by means of an entry in a ledger (32 n 178)) – had become obsolete by the late Empire (P du Plessis *Borkowski’s Textbook on Roman Law* 4 ed (2010) 304-305).

¹³ Zimmermann *Law of Obligations* 542-544.

¹⁴ A history of this development is provided in J H Wigmore “A Brief History of the Parol Evidence Rule” (1904) 4 *Colum LR* 338. There is some authority for the proposition that the Statute of Frauds was based on

The reasons for the adoption of the Statute in England were threefold. First, the social and political upheaval created by civil war, the Cromwellian dictatorship and the Restoration resulted in many perjured claims. This led to the complaint that

“every thing is made an action on the case, and actions on the case are become one of the great grievances of the nation; for two men cannot talk together but one fellow or other, who stands in a corner, swears a promise and cause of action. These catching promises must not be encouraged. It were well if a law were made whereby some ceremony, as striking hands etc., were required to every promise that should bind”.¹⁵

Secondly, juries decided matters of fact based on their personal knowledge of events.¹⁶ Finally, parties to the dispute were precluded from giving evidence regarding the transaction, because they were not regarded as competent witnesses.¹⁷

The Statute of Frauds was accordingly enacted “[f]or prevention of many fraudulent Practices which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury.”¹⁸ Sections 4 and 17 of the Statute originally listed six types of contracts, including sales of land and guarantees (the English equivalent of suretyships in South African law), which had to be reduced to writing in order to be enforceable. This list was

the French *Ordonnance de Moulins* 1566, which excluded parol testimony to prove agreements exceeding the value of 100 *livres*. See E Rabel “The Statute of Frauds and Comparative Legal History” (1947) 63 *LQR* 174 175; A T von Mehren “Formal Requirements” in A T von Mehren (ed) *Int Enc Comp L VII* (1998) 1 18 n 79; G H L Fridman “The Necessity for Writing in Contracts within the Statute of Frauds” (1985) 35 *UTLJ* 43 45; M Furmston *Cheshire, Fifoot & Furmston’s Law of Contract* 15 ed (2007) 260; Perillo (1973-1974) *Fordham LR* 67. A W B Simpson *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (1975) 605-609 disagrees, stating that there is no direct connection between the Statute of Frauds and any other continental legislation which preceded or followed it.

¹⁵ *Buckridge v Shirley* (1671) per Sir Hale CJ, cited in Simpson *History of the Common Law of Contract* 603.

¹⁶ Simpson *History of the Common Law of Contract* 604. See also Fridman 1985 *UTLJ* 47; English Law Revision Committee “Sixth Interim Report: The Statute of Frauds and the Doctrine of Consideration” (1937) XV *Can Bar Rev* 585 589.

¹⁷ Simpson *History of the Common Law of Contract* 605; Fridman 1985 *UTLJ* 47; English Law Revision Committee 1937 *Can Bar Rev* 589.

¹⁸ Preamble to the Statute of Frauds.

later drastically reduced in England.¹⁹ However, the Statute still applies to guarantees and that part of it which governed alienations of land was later re-promulgated, with some modification, as the Law of Property Act 1925. This Act itself was repealed and replaced by the Law of Property (Miscellaneous Provisions) Act in 1989 which, contrary to its predecessors, now provides that a sale of land which has not been reduced to writing is void rather than unenforceable.

If the Statute had been purely a product of particular historical circumstances, one would have expected its provisions to become obsolete once those circumstances changed. This has obviously not been the case. The historical justification for the Statute also does not explain why other legal systems, which do not share the same history, nevertheless impose formal requirements for similar transactions.

For example, successive South African legislatures imposed formal requirements for sales of land. Although these were not required to be in writing in the Cape, a written recordal was required in terms of section 30 of Transvaal Proclamation 8 of 1902, section 49 of Free State Ordinance 12 of 1906, and Law 12 of 1884 in Natal. The wording of the last-mentioned statute echoed that of the English Statute of Frauds and provided that no contract of land could be sued upon unless it was evidenced by some writing and signed. The main object underlying the imposition of formalities during this period (with the exception of Natal) was not to prevent “fraudulent [p]ractices” but rather to allow the *fiscus* to keep track of land transactions for the purpose of levying transfer duty.²⁰

This pre-Union legislation was later variously repealed and replaced by section 1(1) of the General Law Amendment Act 68 of 1957, section 1(1) of the Formalities in respect of Contracts of Sale of Land Act 71 of 1969 and finally section 2(1) of the Alienation of Land Act in 1981. These Acts all provided that a sale of land must be in writing in order to be valid. The purpose of formal requirements can no longer be attributed to the collection of

¹⁹ In terms of the Law Reform (Enforcement of Contracts) Act 1954. In the US however, the Statute still applies, for the most part in its original form. See C N Brown *Corbin on Contracts 4: Statute of Frauds* §§ 12.1-23.11 (1997) 5; K Zweigert & H Kötz *Introduction to Comparative Law* 3 ed (tr T Weir) (1998) 374.

²⁰ A D J van Rensburg & S H Treisman *The Practitioner's Guide to the Alienation of Land Act* 2 ed (1984) 22; *Brink v Wiid* 1968 1 SA 536 (A) 541D-E.

transfer duty, as this was by now regulated in a separate statute.²¹ Rather, it appears that the choice to continue to prescribe formalities for sales of land was motivated by the need to promote uniformity throughout the country. This is evident in the then Minister of Justice's comments about the clause in the Bill which would later become section 1 of the General Law Amendment Act 68 of 1957:

"Ons kan tog nie in Suid-Afrika oor so 'n belangrike saak toelaat dat, as ek hier in die Kaap woon ek vryelik 'n eiendom kan verkoop sonder 'n geskrewe kontrak nie, maar as ek na Bloemfontein verhuis dan moet dit 'n geskrewe kontrak wees. Daar moet eenvormigheid wees".²²

However, neither the General Law Amendment Act 68 of 1957 nor the Formalities in respect of Contracts of Sale of Land Act 71 of 1969 addressed the problem created by judicial pronouncements on the availability of an enrichment claim when one of the parties had performed in terms of a formally invalid sale of land,²³ or the effect of full performance by both parties in terms of such a contract.²⁴ The Alienation of Land Act, in addition to prescribing formalities in section 2(1), was designed to rectify such omissions.²⁵

Suretyships in their turn could be concluded orally at common law in most of South Africa²⁶ and this rule persisted until the promulgation of section 6 of the General Law Amendment Act in 1956. The only exception was Natal's Law 12 of 1884 (the echo of the Statute of

²¹ The Transfer Duty Act 40 of 1949. See also Van Rensburg & Treisman *Guide to the Alienation of Land Act* 22.

²² *Hansard* 13 June 1957 col 8397.

²³ See eg *Carlis v McCusker* 1904 TS 917, in which it was held that a party who had performed in terms of a formally defective contract could not reclaim his performance unless he could show that the other party was unwilling or unable to perform. This is discussed in detail in ch 6 (6 3 3 4 2).

²⁴ While full performance excluded possible enrichment claims (see *Wilken v Kohler* 1913 AD 135), it did not validate the contract retrospectively. This meant, for example, that the purchaser could not sue the seller in the event of a defect in the property. Again, this is discussed in detail in ch 6 (6 5).

²⁵ See s 28. For the sake of completeness, it should be pointed out that those provisions of the Alienation of Land Act which regulate sales of land on instalment were promulgated as a result of the failure of the Sale of Land on Instalments Act 72 of 1971 to fulfil its purpose, which was to protect buyers of fixed property against exploitation by large property developers (*Hansard* 21 August 1981 col 1581, 1587; Van Rensburg & Treisman *Guide to the Alienation of Land Act* 2).

²⁶ C F Forsyth & J T Pretorius *Caney's The Law of Suretyship* 6 ed (2010) 67; N Grové *Die Formaliteitsvereiste by Borgstelling* LLM thesis University of Pretoria (1984) 2; *Stride v Wepener* 1903 TH 383 386-387; *Silver Garbus & Co (Pty) Ltd v Teichert* 1954 2 SA 98 (N) 105.

Frauds). As in the case of sales of land, the historical reason for the imposition of formal requirements was a need to ensure uniformity.²⁷ There appears to be no evidence of a debate, in the context of either the sale of land or suretyships, regarding the possible advantages (and disadvantages) of formalities.²⁸

It is evident then, that the historical backgrounds of the Statute of Frauds, the Alienation of Land Act and the General Law Amendment Act are not the same. Nevertheless, these Acts all impose formal requirements on similar contracts. Nor are England and South Africa unique in their choice of these transactions; the same are also subject to formal requirements in civil law jurisdictions like Germany.²⁹ Thus, it appears that the imposition of formal requirements on certain types of transactions results from a common impetus which transcends local circumstances of the time and relates to the role of formalities in contract law in general. It is this general role of formalities which will serve as the focus of the next section.

2 3 The functions of form

2 3 1 Introduction

In the earlier stages of the development of contract law, form fulfilled a constitutive function. A contract was binding, not because it was based on agreement, but because a specific ritual which fulfilled certain magical, sacramental and/or psychological functions had been followed.³⁰ These rituals could vary, from the very formal (like the *stipulatio* of Roman law, which required that the parties be in the presence of each other and utter

²⁷ *Hansard* 22 May 1956 col 6203.

²⁸ Regarding sales of land, there are very brief references in the parliamentary debates to the fact that prescribing formalities for these types of transactions would prevent unnecessary disputes regarding the terms of the agreement (*Hansard* 13 June 1957 col 8397; *Hansard* 18 June 1957 col 8771). Nothing was said about the functions of form in suretyships. This is presumably due to the fact that this topic had already been considered at an earlier stage by the SA Law Revision Committee (*Second Report* 15-16 June 1950; unpublished report available at the Brand Van Zyl Law Library, UCT). The Committee recommended that formalities should be imposed for these agreements due to the cautionary function fulfilled by formal requirements (para 42). This function is discussed in 2 3 2 below. However, the Committee did not recommend formal requirements for alienations of land – see 2 4 1 below.

²⁹ See § 311b BGB (sales of land) and § 766 BGB (suretyships).

³⁰ Von Mehren "Formal Requirements" in *Int Enc Comp L VII* 6; Perillo (1973-1974) *Fordham LR* 45.

ritual words)³¹ to the seemingly bizarre (for example, in early Bavaria and Alemannia a transfer of land was only complete once the small boys who acted as witnesses to the ceremony had all received the requisite box on the ear. It served as an *aide-mémoire*, and without it, the transaction would be void).³² However, irrespective of the choice of ritual, they all shared a common element: when the transaction was clothed in the appropriate formality, it was valid (despite the possibility that what a party intended and the actual effect of the transaction were at odds);³³ without the required form, the transaction was void. Unlike the modern position therefore, form was not an additional requirement for validity, but the only reason for the enforcement of the transaction.³⁴ As Dulkeit put it, form was

“the true basis for the effectiveness of the legal transaction. Manifested intention as such [had] no legal significance ... Form [was] ... the ground for the legal act’s effectiveness.”³⁵

As societies developed, so too did the idea that a contract should be binding because it was based on consensus, and not because it was clothed in a particular form.³⁶ Zimmermann describes this transition as a shift from *verba* to *voluntas*: a change in focus from an objective to a subjective approach.³⁷ However, the notion that contracts are generally regarded as form-free is limited by the qualification that certain types of contracts

³¹ Zimmermann *Law of Obligations* 68-69; Perillo (1973-1974) *Fordham LR* 45. Another example in Roman law would be that of *mancipatio* – see eg H Kötz *European Contract Law 1: Formation, Validity, and Content of Contracts; Contract and Third Parties* (1997) 78.

³² C Wasserstein Fassberg “Form and Formalism: A Case Study” (1983) 31 *Am J Comp L* 627; Zimmermann *Law of Obligations* 86 n 114.

³³ Zimmermann *Law of Obligations* 82-84; Kötz *European Contract Law 1* 79. It was not only Roman law which recognised this constitutive effect of form – see also *Genesis* 27, 29 in which Isaac’s blessing given to Jacob (instead of Esau) and Jacob’s marriage to Leah (instead of Rachel) were both regarded as valid, despite Jacob and Leah’s respective deceit.

³⁴ Zimmermann *Law of Obligations* 82.

³⁵ Dulkeit *Zur lehre vom Rechtsgeschäft im klassischen römischen Recht: Festschrift Fritz Schulz I* (1951) 161-162, cited in Von Mehren “Formal Requirements” in *Int Enc Comp L VII* 6 (translation provided by the author). See also Wasserman Fassberg 1983 *Am J Comp L* 627-628 who states that

“[p]rescribed forms were unique and exclusive means of attaining desired results. Deviations from these forms, or defects in their performance, were fatal.” (Footnotes omitted).

³⁶ For SA, see *Conradie v Rossouw* 1919 AD 279 287-288 (per Solomon ACJ); 310, 321-322 (per De Villiers AJA) and *Goldblatt v Fremantle* 1920 AD 123 128 (per Innes CJ).

³⁷ *Law of Obligations* 621-622. See also Perillo (1973-1974) *Fordham LR* 41.

are regarded as so commercially important, or as involving obligations of such an onerous nature, that legislatures impose additional requirements such as writing, before they will be regarded as valid and/or enforceable. Form is valued in these modern contexts not because it fulfils some sacramental function, but for more secular reasons.

2 3 2 Evidentiary, cautionary and channelling functions

In *Wilken v Kohler*,³⁸ Innes J stated that

“[r]ecognising that contracts for the sale of fixed property were, as a rule, transactions of considerable value and importance, and that the conditions attached were often intricate, the Legislature, in order to prevent litigation and to remove a temptation to perjury and fraud, insisted upon their being reduced to writing.”³⁹

And in *Fourlamel (Pty) Ltd v Maddison*,⁴⁰ Miller JA stated, in relation to suretyship agreements, that

“[h]owever many objects the Legislature may have had in mind in enacting sec. 6 of Act 50 of 1956, one of them was surely to achieve certainty as to the true terms agreed upon and thus avoid or minimize the possibility of perjury or fraud and unnecessary litigation. This is a purpose which, despite differences in wording, is common to the enactments relating [to formal requirements] ... The Legislature may also have been influenced by other considerations, for example, that suretyship being an onerous obligation, involving as it does the payment of another's debts, would-be sureties should be protected against themselves to the extent that they should not be bound by any precipitate verbal undertakings to go surety for another but would be bound only after their undertaking had been recorded in a written document and signed by them or on their behalf.”⁴¹

Although neither Innes JA nor Miller JA referred to any sources which attributed these functions to writing they were, in fact, reiterating points that had been made as long ago as in the works of Grotius, Austin and Von Jhering.

³⁸ 1913 AD 135.

³⁹ *Wilken v Kohler* 1913 AD 135 142. Reducing an agreement to writing ensures that the parties “have before [them] in black and white the terms of the agreement [they are] letting [themselves] in for” (*Van Rooyen v Hume Melville Motors (Edms) Bpk* 1964 2 SA 68 (C) 71E).

⁴⁰ 1977 1 SA 333 (A).

⁴¹ 342H-343B.

For example, Grotius states that formalities act as signs of deliberate intent,⁴² while Austin ascribes a dual purpose to them:

“1. To provide evidence of the existence and purport of the contract in case of controversy. 2. To prevent inconsiderate engagements.”⁴³

Von Jhering says the following about formalities:

“[L]egal formalities relieve the judge of an inquiry *whether* a legal transaction was intended and – in case different forms are fixed for different legal transactions – *which* was intended ... [Secondly] [t]he beneficial effect of form ... lies ... especially in the form itself, in the impression which it produces on the transacting party in warning him that he is binding himself ... [Finally] [a]n advantage of a written formulation of legal transactions ... lies in the fact that it renders later proof secure.”⁴⁴

Despite such clear indications to the contrary, Lon Fuller⁴⁵ is usually credited with explaining the various functions of form, at least in Anglo-American legal systems.⁴⁶ Fuller himself however, cites both Austin and Von Jhering as authorities on the functions of form⁴⁷ and it is probably more accurate to say that to Fuller should be attributed the labels for the functions of form.

⁴² *De Jure Belli ac Pacis Libri Tres II* tr F W Kelsey (1925) 331-332.

⁴³ “Fragments – On Contracts” in R Cambell (ed) *Lectures on Jurisprudence or the Philosophy of Positive Law II* 5 ed (1911) 907.

⁴⁴ *L'Esprit du Droit Romain dans les Diverses Phases de Son Développement III* 2 ed tr O de Meulenaere (1877) 177-183 (own translation). An English translation of the original German version, *Geist des römischen Recht auf den verschiedenen Stufen seiner Entwicklung* (1865), can be found in A T von Mehren & J R Gordley *The Civil Law System: An Introduction to the Comparative Study of Law* 2 ed (1977) 898-900.

⁴⁵ “Consideration and Form” (1941) 41 *Colum LR* 799.

⁴⁶ See E Posner “Norms, Formalities, and the Statute of Frauds: A Comment” (1996) 144 *U Pa LR* 1971 and the sources cited at 1983 n 14; S J Whittaker “Form” in H G Beale (gen ed) *Chitty on Contracts I: General Principles* 30 ed (2008) 379 n 3.

⁴⁷ See eg 1941 *Colum LR* 800 n 4.

The first and most obvious function is an evidentiary one.⁴⁸ The requirement that an oral agreement should be reduced to writing enables proof of (i) the existence of a contract; and (ii) the nature, scope and extent of its terms.

Secondly, formalities serve a cautionary and protective function.⁴⁹ They cause parties to pause and think more seriously about the transaction into which they are entering and draw attention to any potentially onerous obligations which may be assumed upon contract conclusion. This is particularly relevant in the case of suretyship agreements.⁵⁰ This cautionary concern also underlies section 29A, read with section 2(2A), of the Alienation of Land Act, which provides that a cooling-off right afforded to a specific group of purchasers of residential property must be recorded in writing.⁵¹ A similar cautionary function is fulfilled by the German requirement of notarial authentication for sales of land. Theoretically at least, the notary's role is to inform the parties of the nature and import of the transaction which they are concluding.⁵²

Finally, the channelling function fulfilled by formalities serves to delineate the transition from negotiation to conclusion of the contract.⁵³ Although Fuller saw this function as one which distinguishes only between enforceable and non-enforceable transactions, Von

⁴⁸ 1941 *Colum LR* 800. See also Fridman 1985 *UTLJ* 43; Von Mehren "Formal Requirements" in *Int Enc Comp L VII* 9; S W J van der Merwe, L F van Huysteen, M F B Reinecke & G F Lubbe *Contract: General Principles* 4 ed (2012) 140.

⁴⁹ Fuller 1941 *Colum LR* 800; Fridman 1985 *UTLJ* 49; Von Mehren "Formal Requirements" in *Int Enc Comp L VII* 9; Van der Merwe et al *Contract* 140.

⁵⁰ The English Law Revision Committee 1937 *Can Bar Rev* 617 stated that the formalities relating to contracts of guarantee should be retained on the basis that "there is a real danger of inexperienced people being led into undertaking obligations that they do not fully understand".

⁵¹ See *Gowar Investments (Pty) Ltd v Section 3 Dolphin Coast Medical Centre CC* 2007 3 SA 100 (SCA) and the discussion of this case in ch 6 (6 2 3). See also eg s 22 of the Consumer Protection Act 68 of 2008 which sets certain requirements for information disclosure. While these requirements are procedural, similar policy considerations underlie their imposition – DTI *Memorandum on the Objects of the Consumer Protection Bill, 2008* (B19-2008) 86-87.

⁵² Kötz *European Contract Law* 1 83.

⁵³ Fuller 1941 *Colum LR* 801; Von Mehren "Formal Requirements" in *Int Enc Comp L VII* 9; Van der Merwe et al *Contract* 140.

Jhering ascribed an additional quality to it, in the sense that form also helps to distinguish between different types of legally enforceable transactions.⁵⁴

2 3 3 Reduction in administration costs: formal requirements and penalty defaults

Formalities can also be justified from an economic perspective. The requirement that parties should reduce their agreement to writing (which usually also involves the need to seek legal advice) increases their transaction costs.⁵⁵ This increase can be justified on the basis that

“the major benefit [of formalities] is a reduction in the cost of resolving contract disputes. The cost of proving the existence and terms of a contract is reduced; the probability of an erroneous decision is reduced; and the predictability of the outcome of contract litigation is increased”.⁵⁶

These benefits follow from the fact that the relevant statutory rule imposing the formality is a “penalty default”.⁵⁷ Penalty defaults are a species of default rules. A default rule governs unless the parties contract around it. Usually, the consequence of a default rule is one which the parties are assumed to have wanted in the absence of a term to the contrary.⁵⁸ Penalty defaults provide consequences that the parties would *not* have wanted to govern their contract. They are designed to act as incentives to parties to disclose information, because they are motivated to contract so as to avoid the consequences

⁵⁴ *L'Esprit du Droit Romain III* 179: “[L]a forme ... indique quel est l'acte qu'on a entendu conclure, dans les cas où pour divers actes diverses forms ont été déterminées.” (“[F]orm ... indicates which act one intended to conclude in cases where different forms are prescribed for different acts” – own translation.) This additional effect of the channelling function is also mentioned in Von Mehren “Formal Requirements” in *Int Enc Comp L VII* 9; Whittaker “Form” in *Chitty on Contracts I* 379.

⁵⁵ Transaction costs are regarded as obstacles to socially efficient markets and include the costs of obtaining information, and of searching for, negotiating and enforcing agreements – see P Burrows & C G Veljanovski “Introduction: The Economic Approach to Law” in P Burrows & C G Veljanovski (eds) *The Economic Approach to Law* (1981) 1 10. According to I Erlich & R Posner “An Economic Analysis of Legal Rulemaking” (1974) 3 *J Legal Stud* 257 269-270, the major cost of the Statute of Frauds lies in the legal and negotiation costs incurred in order to comply with its provisions.

⁵⁶ Posner & Erlich 1974 *J Legal Stud* 270.

⁵⁷ This label is provided by I Ayres & R Gertner “Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules” (1989) 99 *Yale LJ* 87.

⁵⁸ See Ayres & Gertner 1989 *Yale LJ* 87; Posner 1996 *U Pa LR* 1981.

imposed by the penalty default⁵⁹ - in the context of statutory formalities, the penalty default prescribes invalidity, unenforceability or voidability.⁶⁰ These penalties encourage the disclosure of information in writing, which in turn creates certainty as to the terms of the agreement and leads to the reduction in subsequent administration costs.⁶¹ In this way it coincides with the evidentiary function identified by Fuller. This information disclosure also has a cautionary function: “to caution is to give information”.⁶² Finally, the production of information helps to determine which type of transaction the parties are concluding and therefore assists in channelling their intentions.⁶³

The characterisation of the statutory rules imposing formalities as penalty defaults explains why the parties would want to comply with formal requirements – to avoid the negative consequences of non-compliance. However, it does not explain why it is insufficient (for example when section 2(1) of the Alienation of Land Act or section 4 of the Statute of Frauds are applicable) for parties simply to avoid the penalty default by stating that they want their oral contract enforced.⁶⁴ They must do something more in order to ensure enforcement – that “something more” is compliance with the relevant statutory formalities.⁶⁵ To this extent, rules which result in invalidity or unenforceability in the event of formal non-compliance would be immutable rules, as opposed to mere default rules.

Immutable rules are rules which parties cannot agree to ignore or avoid.⁶⁶ They operate as a restriction on contractual freedom because parties cannot achieve a different result to that imposed by the immutable rule, irrespective of their intention. For example, one cannot enter into an agreement to murder a third party; such a contract will always be contrary to public policy and therefore void, irrespective whether the parties state that their intention is otherwise. Formalities resemble immutable rules in that they operate as a restriction on contractual freedom because the parties are not free to formulate the contract as they wish. Once they follow the prescribed formalities however, they achieve

⁵⁹ Ayres & Gertner 1989 *Yale LJ* 124.

⁶⁰ See ch 6 (6 2).

⁶¹ Ayres & Gertner 1989 *Yale LJ* 124.

⁶² 124.

⁶³ 125.

⁶⁴ Posner 1996 *U Pa LR* 1981-1986.

⁶⁵ 1981-1982.

⁶⁶ Posner 1996 *U Pa LR* 1982; Ayres & Gertner 1989 *Yale LJ* 87.

their shared intention.⁶⁷ Unlike true immutable rules therefore, formal requirements do not prevent behaviour; they only ensure that parties follow a prescribed format.

Posner has argued that the evidentiary, cautionary and channelling functions that Fuller attributes to formal requirements, and the related information-disclosure role ascribed to them by economic theorists, cannot explain why certain rules imposing statutory formalities should have this immutable quality; at most, the functions require a default rule.⁶⁸ This leads Posner to conclude that this immutable aspect can only be explained on the basis of the prevention of fraud and perjury.⁶⁹ Rules imposing statutory formalities exist “to prevent people from defrauding victims with whom they do not necessarily have a contractual relationship.”⁷⁰ Unlike Fuller, Posner sees this as the purpose of formalities and as distinct from, rather than contained within, the evidentiary function.⁷¹

It should be pointed out that Posner’s analysis can only apply to formal requirements which affect the validity or enforceability of a contract. Formal requirements which result in voidability in the event of non-compliance have no immutable dimension.⁷² A party is always entitled to avoid the penalty default by choosing to enforce, rather than rescind, the contract. It is argued that this absence of immutability may be attributed to the fact that these requirements are imposed primarily for the purpose of providing information to the weaker contracting party; they do not address the more fundamental question of how the existence of the contract should be proved in order to avoid fraud.⁷³

The value of Posner’s analysis, in the context of formal requirements imposed for the validity or enforceability of certain agreements, is that it emphasises that the overarching

⁶⁷ Posner 1996 *U Pa LR* 1982.

⁶⁸ 1983-1984.

⁶⁹ 1986.

⁷⁰ 1986.

⁷¹ 1984-1985 n 19.

⁷² See eg s 2(2A) of the Alienation of Land Act (cooling-off right of certain purchasers must be recorded in writing) and s 93 of the National Credit Act 34 of 2005 (credit provider must provide the consumer with a written copy of the credit agreement).

⁷³ A similar argument is made in M Ní Shúilleabháin “Formalities of Contracting: A Cost-Benefit Analysis of Requirements that Contracts Must Be Evidenced in Writing” (2005) 27 *DULJ* 113 142. See also ch 6 (6 2 3) for an extensive discussion of the policy considerations underlying the different consequences imposed for non-compliance with formal requirements.

purpose of these formal requirements is the prevention of fraud. In most cases, formalities will achieve this purpose through fulfilling evidentiary, cautionary and channelling functions. In some cases however, formalities may encourage fraud. For example, it is entirely possible that a party relies on formal defectiveness to escape an oral agreement which was seriously intended. The question then becomes whether a court gives greater weight to the *functions* of formalities and holds that the agreement is invalid, or whether it allows itself to admit that the *purpose* of formalities, as identified by Posner, has failed and that the innocent party should be afforded a remedy which could lead to the enforcement of the actual agreement, in spite of the fact that there is no written evidence of such an agreement. This is considered in greater detail in a subsequent chapter.⁷⁴ For the present, the discussion that follows will consider the recognised exceptions to formal requirements.

2 3 4 Exceptions to formal requirements

Fuller has argued that

“[t]he need for investing a particular transaction with some legal formality will depend upon the extent to which the guaranties that the formality would afford are rendered superfluous by forces native to the situation out of which the transaction arises.”⁷⁵

One indeed finds that certain fact patterns which would otherwise fall within the scope of the relevant formal requirements are treated as exempt from these requirements. One such exception can be found in German legislation. According to paragraph 350 HGB, guarantees given by merchants (*Kaufleute*)⁷⁶ in the course of their business activities (ie mercantile transactions) do not have to be reduced to writing. However, this only applies when the merchant guarantees a debt in a commercial transaction; if the same merchant were to guarantee the debt of a friend, the exception would not apply and the guarantee would have to be in writing in order to be valid.⁷⁷ This exception exists not only because it is assumed to promote efficient commercial activity, but also because merchants are

⁷⁴ Ch 6 (6 4).

⁷⁵ 1941 *Colum LR* 805. See also Perillo (1973-1974) *Fordham LR* 49.

⁷⁶ As to what constitutes a “merchant”, see § 1(1) HGB.

⁷⁷ A T von Mehren “Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis” (1958-1959) 72 *Harv LR* 1009 1029.

thought not to be in need of the added protection afforded by a writing requirement, due to their commercial experience.⁷⁸

A similar distinction between commercial and non-commercial transactions is made in English law, where courts have held that certain oral guarantees are enforceable because they are merely incidental to a larger transaction which indicates that the purpose of the guarantee was to provide some business or pecuniary advantage to the guarantor.⁷⁹ Unlike paragraph 350 HGB, this common-law exception is judge-made and has been described as a deliberate evasion of the Statute of Frauds.⁸⁰

One example of where this exception has been held to be applicable is in the case of guarantees provided by *del credere* agents. These are agents who, for a higher commission, guarantee the performance of the parties with whom they contract on behalf of their principals. In *Couturier v Hastie*,⁸¹ it was held that the Statute of Frauds does not apply to this type of guarantee, and that it may be concluded orally, for the following reasons:

“[B]eing the agents to negotiate the sale, the commission is paid in respect of that employment; a higher reward is paid in consideration of their taking greater care in sales to their customers, ... and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them; and though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration is given.”⁸²

In other words, although the agent provides a guarantee, this is only incidental to the main purpose of the contract with his principal, which is to ensure that he exercises greater care by choosing to sell only to solvent purchasers in return for a higher commission.⁸³

⁷⁸ Von Mehren (1958-1959) *Harv LR* 1029-1030; “Formal Requirements” in *Int Enc Comp L VII* 81.

⁷⁹ This exception is also recognised in US law, where it is referred to as the “main purpose” or “leading object” rule. See Brown *Corbin on Contracts* 4 313-314.

⁸⁰ Furmston *Law of Contract* 266; E Peel *Treitel's The Law of Contract* 13 ed (2011) 194.

⁸¹ 155 ER 1250 (1852).

⁸² 1257.

⁸³ 56.

Similarly, an agreement to pay off an encumbrance on property does not fall within the scope of the Statute. Although the encumbrance arises out of another's debt, the guarantee is incidental to the larger purpose, which is to rid the property, in which the guarantor has an interest, of a liability.⁸⁴ However, the guarantee given by a majority shareholder that he will pay the company's debts should it fail to do so, in order to prevent its assets from being attached, does not fall outside the ambit of the Statute of Frauds.⁸⁵ The exception does not operate to save guarantees which are motivated by personal interests; it only operates to exempt transactions when the guarantor also has a legal interest in the subject matter of the main contract.⁸⁶

It is difficult to reconcile these cases in which an oral guarantee has been enforced with the precise wording of section 4 of the Statute of Frauds. However, it is possible to justify the so-called "*del credere*" and "property" exceptions from the perspective of the functions of formalities. The guarantors in the examples discussed above are not motivated by sentiment. Therefore, like the merchants who fall within the scope of paragraph 350 HGB, they do not need the caution afforded by reducing the guarantee to writing.⁸⁷ These guarantors furthermore receive a direct benefit as a result of the provision of the oral guarantee – the nature of the transaction itself "supplies relatively unambiguous evidence supporting the assertion that the [guarantor's] promise was made".⁸⁸ The need for a written agreement to serve as evidence of the transaction is superfluous.

Unlike its German and English counterparts, South African law does not recognise any exception to the rule that suretyship agreements must be reduced to writing. However,

⁸⁴ *Fitzgerald v Dressler* 141 ER 861 (1859). In this case, A sold linseed to B, who sold it for a higher price to C. A, as the original vendor, had a lien over the goods until B paid him. A agreed to deliver the linseed to C before B paid him, in return for an oral promise from C that he would be liable for this payment. According to the court:

"At the time the promise was made, the defendant was substantially the owner of the linseed in question, which was subject to the lien of the original vendors for the contract price. The effect of the promise was neither more nor less than this, to get rid of the incumbrance, or, in other words, to buy off the plaintiffs' lien. That being so, it seems to me that the ... case is not within the [S]tatute." (869).

⁸⁵ *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778.

⁸⁶ 787, 791, 792.

⁸⁷ *Brown Corbin on Contracts* 4 317.

⁸⁸ *Brown Corbin on Contracts* 4 317; *Peel Contract* 194.

section 3(1) of the Alienation of Land Act does provide that formal requirements do not apply to the sale of land at public auctions.⁸⁹ As Jansen J noted in *Gibbs v Vantyi*,⁹⁰ the reason for this exception is that

“an agreement of sale at a public auction is concluded publicly at the fall of the auctioneer’s hammer, [so] there is little scope for uncertainty, disputes or malpractices. The process has been conducted in public. The conditions of sale have been read publicly to those present who accept those conditions by their continued participation in the procedure. The procedure is concluded formally in public when the auctioneer’s hammer falls.”⁹¹

It appears then, that while most legal systems impose formalities for similar kinds of contracts, this similarity does not extend to recognised exceptions. The South African insistence on written suretyships, without exception, may avoid problems relating to investigation of the purpose of the transaction or the expertise of the surety, but does so at the expense of commercial efficacy. Many cases in which the defence of formal invalidity is raised, involve parties who are experienced businessmen. These parties probably have sufficient acumen and experience not to require the protection of a written suretyship agreement. It is arguable that such sureties should not be allowed to resort to the technical defence of formal invalidity in order to escape their obligations on the assumption that they were unaware of their nature.

Such concerns relate to criticisms which have been lodged against formalities in general. It is these criticisms which will serve as the focus of the following section.

⁸⁹ Public auctions were also regarded as exceptions to the formal requirements set out in s 30 of Transvaal Proclamation 8 of 1902 (*Schuurman v Davey* 1908 TS 66) and s 49 of Free State Ordinance 12 of 1906 (*De Villiers v Parys Town Council* 1910 OPD 55). See also *Sugden v Beaconsfort Dairies (Pty) Ltd* 1963 2 SA 174 (E) 184F-187A.

⁹⁰ 2010 2 SA 606 (ECP).

⁹¹ 611A-B.

2 4 The dysfunctions of form⁹²

2 4 1 Introduction

It was stated above that the South African legislature was motivated largely by a desire to ensure uniformity throughout the Union in its decision to prescribe formal requirements for both suretyships and sales of land.⁹³ This decision had been supported by an earlier Law Revision Committee Report in the context of the former;⁹⁴ it was wholly at odds, however, with the Committee's recommendation in relation to the latter.⁹⁵

According to the Committee, the best way to achieve uniformity in sales of land would have been through the abolition of all pre-Union legislation prescribing formal requirements and the simultaneous return to the common-law rule that such transactions could be concluded orally.⁹⁶ Its recommendation was due, in large part, to the fact that

“on the whole, the requirement of formalities may promote as many frauds as it prevents, for it affords a dishonest man a technical ground for escaping his obligations with impunity.”⁹⁷

The Law Revision Committee was requested by Cabinet to reconsider its recommendation.⁹⁸ Although it politely refused to do so,⁹⁹ it was overruled, for reasons

⁹² This label is used by Perillo (1973-1974) *Fordham LR* 39 to describe the disadvantages of formalities.

⁹³ See 2 2.

⁹⁴ *Second Report* (15-16 June 1950) para 42.

⁹⁵ Para 29.

⁹⁶ Paras 11, 29. This was also the majority view of the judges of the Appellate Division, which was one of the interest groups approached by the Law Revision Committee for its view on this topic. A minority had recommended that formal requirements should be prescribed for sales of land between parties belonging to certain racial groups who, allegedly, had a tendency to engage in numerous transactions of this type – “[i]n this regard the Indian community of Natal was mentioned” (para 30). This recommendation did not elicit a favourable response:

“The Committee feels ... that this is not a sufficiently cogent consideration ... [to] warrant the introduction of legislation on the subject which should be confined to a particular racial group in the Provinces, or in one or more of them.” (Para 30).

⁹⁷ Para 16. A further reason was the fact that since most contracts for the sale of land would in any event be concluded in writing, the recommendation that an oral sale of land should be valid would, in the Committee's opinion, have had very little practical impact (para 29).

which remain undocumented.¹⁰⁰ However, one could hazard a guess: the legislature presumably subscribed to the view expressed in *Wilken v Kohler*¹⁰¹ that the temptation to commit fraud and perjury in the context of sales of land, traditionally regarded as transactions of considerable value and importance, was sufficient to justify the imposition of formal requirements, even if these requirements might in themselves promote unconscionable conduct.¹⁰²

Nevertheless, the concern raised by the Committee, namely that formalities often promote rather than prevent fraud, is one of the main criticisms directed towards formal requirements. In addition, formalities can be criticised because they require technical skill in drafting and can lead to unnecessary litigation.¹⁰³ Each of these issues will now be considered in greater detail.

2 4 2 Formal requirements and drafting difficulties

The most obvious disadvantage of formal requirements is that compliance is both time-consuming and a potential source of technical pitfalls.¹⁰⁴ The fact that legislation imposing

⁹⁸ See *Eighth Report* (27 July 1956) para V(3). Unpublished report available at the Brand Van Zyl Law Library, UCT.

⁹⁹ Para V(7):

“It is unnecessary ... to repeat the reasons which led the Committee ... to making the recommendation that [legislation imposing formal requirements for sales of land] should be repealed ... [I]t is respectfully submitted that they fully support the [recommendation] which [was] made.”

¹⁰⁰ There is no further reference to this aspect in any of the subsequent reports of the Law Revision Committee. It is also not addressed in any of the parliamentary debates.

¹⁰¹ 1913 AD 135 142.

¹⁰² The Law Revision Committee's concern that formal requirements might promote fraud was raised again by J C de Wet *Memorandum insake Artikel 1(1) van Wet 68 van 1957* (27 June 1966) 1-2, unpublished memorandum available as part of the JC de Wet collection in the JS Gericke Library of the University of Stellenbosch, in which he also suggested that formalities for sales of land should be abolished.

¹⁰³ R H Christie & G B Bradfield *Christie's The Law of Contract in South Africa* 6 ed (2011) 114-115 provide some additional “unenthusiastic ... observations” (115) on formalities in the South African context.

¹⁰⁴ Grové *Borgstelling* 6; Peel *Contract* 188. As stated in the *Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches* (1888), translated in Von Mehren & Gordley *The Civil Law System* 900, “the observation of form requires both a precise knowledge and the skill necessary to use forms.”

formalities often does not specify what should appear in the written agreement¹⁰⁵ means that parties have to resort to legal practitioners in order to ensure that their contract complies with the relevant provision. While the increase in transaction costs may be justified on the basis of the resultant information disclosure and the related evidentiary, cautionary and channelling advantages, the existence of transaction costs in the context of statutory formalities has also led to the increasing use of standard form contracts. As Grové points out,

“[d]it is maklik om te bepaal dat ‘n benoemde kontrak, om geldig en afdwingbaar te wees, op skrif gestel moet word. So ‘n bepaling het egter nie sonder meer tot gevolg dat jou individuele en onervare verbruiker beskerm word nie. Die rede hiervoor is daarin geleë dat vormvereistes slegs die uiterlike manifestasie van ‘n ooreenkoms reël. Die inhoud van die ooreenkoms word steeds deur die partye self bepaal. Daarom dat statutêre vormvereistes noodwendig tot gevolg het dat standaardvormkontrakte ontstaan.”¹⁰⁶

The benefit of standard form contracts is that they make available a suitable set of terms at no extra cost to the parties. These terms may be used repeatedly, thereby saving time and removing the need to resort to costly legal assistance, resulting in a reduction of transaction costs.¹⁰⁷ However, these types of contracts, which are prepared in advance by one party and presented to another for signature on a take-it-or-leave-it basis, can hardly be said to induce the careful deliberation allegedly inspired by formalities.¹⁰⁸ The party to whom the contract is presented often does not read it or if he does, probably does not fully understand its terms or may be powerless to vary them.¹⁰⁹ In these instances, the

¹⁰⁵ Eg, s 2(1) of the Alienation of Land Act merely states that the parties' agreement must be contained within a deed, while s 6 of the General Law Amendment Act simply provides that a suretyship agreement must be embodied in a written document. The relevant provisions of the Statute of Frauds and the BGB are similarly vague.

¹⁰⁶ *Borgstelling* 6-7.

¹⁰⁷ P J Aronstam *Consumer Protection, Freedom of Contract, and the Law* (1979) 24; M J Trebilcock & D N Dewees “Judicial Control of Standard Form Contracts” in P Burrows & C G Veljanovski (eds) *The Economic Approach to Law* (1981) 93 96.

¹⁰⁸ Christie & Bradfield *The Law of Contract* 109; C F C van der Walt “Die Huidige Posisie in die Suid-Afrikaanse Reg met betrekking tot Onbillike Kontraksbedinge” (1986) 103 *SALJ* 646 657; Fridman 1985 *UTLJ* 49-50.

¹⁰⁹ G T S Eiselen *Die Beheer oor Standaardbedinge: ‘n Regsvergelykende Onderzoek* LLD thesis University of Potchefstroom (1988) 31-33; Trebilcock & Dewees “Standard Form Contracts” in *The Economic Approach to Law* 94. Arguably, s 22 of the Consumer Protection Act, which specifies that any notice or document

cautionary function of form is rendered nugatory and South African courts have had to resort to the law on mistake in order to determine whether a party should be protected against the consequences of his decision to sign such a standard form contract.¹¹⁰

2 4 3 Formalities as a source of unnecessary litigation

The second general criticism directed towards formalities is that they may increase rather than reduce the scope for litigation. The fact that an agreement has been reduced to writing does not prevent litigation about its content. For example, disputes arise as to the sufficiency of the description of the parties or the subject matter or whether the agreement can consist of more than one document. Furthermore, any statute that prescribes formalities for specific contracts increases the likelihood of definitional problems: is the contract before the court one which falls within the scope of the relevant statute, or not? This problem is most apparent when it comes to distinguishing between different forms of personal security.

Conceptually, it is possible to distinguish between a suretyship, a guarantee and an indemnity.¹¹¹ In South African law, the surety's liability is secondary in the sense that his obligation only becomes enforceable once the principal debtor (whose liability is primary) breaches his contract with the creditor.¹¹² The surety's liability is also accessory, because it is dependent on the existence of a valid principal debt.¹¹³ In a contract of guarantee, the guarantor undertakes to indemnify the creditor against the consequences of one or other

provided to a consumer must be written in plain and intelligible language, is aimed at addressing this problem.

¹¹⁰ This is most evident in cases dealing with standard credit application forms which also contain suretyship agreements. See eg *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA); *Keens Group Co (Pty) Ltd v Lötter* 1989 1 SA 585 (C); *Davids v Absa Bank Bpk* 2005 3 SA 361 (C); *Roomer v Wedge Steel (Pty) Limited* 1998 1 SA 538 (N); *Blue Chip Consultants (Pty) Ltd v Shamrock* 2002 3 SA 231 (W); *Absa Bank Ltd v Trzebiatowsky* 2012 5 SA 134 (ECP).

¹¹¹ The discussion in the main text will not engage in the debate surrounding the correct definition of suretyship, as to which see Forsyth & Pretorius *Suretyship* 28 and especially nn 6, 7; the minority judgment per Stegmann J in *Carrim v Omar* 2001 4 SA 691 (W) para 31 ff; J J Henning & K L Mould "Suretyship" in J A Faris & L T C Harms (eds) *LAWSA* 26 2 ed (2011) para 285 n 1. Irrespective of which definition is adopted, the defining characteristics of a suretyship, as apparent in the main text, remain the same.

¹¹² Forsyth & Pretorius *Suretyship* 28-29; G F Lubbe "Die Onderskeid tussen Borgtog en Ander Vorme van Persoonlike Sekerheidstelling" (1984) 47 *THRHR* 383 385.

¹¹³ Forsyth & Pretorius *Suretyship* 29-30; Lubbe 1984 *THRHR* 385.

future event.¹¹⁴ His liability is therefore primary and is not dependent on the existence of another obligation.¹¹⁵ Finally, an indemnity exists when the indemnifier “[undertakes] a principal obligation to indemnify another should that other suffer a loss as a result of undertaking a particular activity”.¹¹⁶

While it is possible to draw a theoretical distinction between the various forms of personal security, the distinction is less clear in practice.¹¹⁷ This problem of classification existed prior to the promulgation of the General Law Amendment Act.¹¹⁸ According to Forsyth,¹¹⁹ one advantage of the limited application of the Act is that it has led to a sharpening of the (theoretical) distinction between suretyship and other forms of personal security.¹²⁰ While this may be true, the problem of classification and the subsequent disputes surrounding the nature of an agreement are not alleviated simply because the Act now prescribes writing specifically for suretyship agreements.¹²¹

This means that the channelling function attributed to writing, at least as that function was understood by Von Jhering,¹²² does not assist a court in determining which type of contract

¹¹⁴ Forsyth & Pretorius *Suretyship* 32. Suretyship is therefore a form of guarantee in its broadest sense - see Lubbe 1984 *THRHR* 392.

¹¹⁵ Lubbe 1984 *THRHR* 391; Forsyth & Pretorius *Suretyship* 32.

¹¹⁶ Forsyth & Pretorius *Suretyship* 35. The authors indicate that the difference between an indemnity and guarantee in its narrow sense is merely one of nuance and degree.

¹¹⁷ 34.

¹¹⁸ See eg *Renou v Walcott* (1905-1910) 10 HCG 246; *Imperial Cold Storage and Supply Company Limited v Julius Weil and Co* 1912 AD 747.

¹¹⁹ “Suretyship” in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 417 419, 422

¹²⁰ In England, s 4 of the Statute of Frauds has been held to be applicable only to guarantees (suretyships in the SA sense) - see S J Whittaker “Suretyship” in H G Beale (gen ed) *Chitty on Contracts II: Specific Contracts* 30 ed (2008) 1639 1664; *Bourkmire v Darnell* 91 ER 663 (KB) 663. The failure to include indemnities (guarantees in the SA context) within the ambit of the Statute of Frauds has been explained as a judicial attempt to restrict the scope of the Statute (*Peel Contract* 194) and has been criticised on the basis that the effect has been “many hair-splitting distinctions of exactly that kind which brings the law into hatred, ridicule and contempt by the public” (*Yeoman Credit Ltd v Latter* [1961] WLR 828 835).

¹²¹ As is evident in cases like *Northern Assurance Co Ltd v Delbrook-Jones* 1966 3 SA 176 (T); *List v Jungers* 1979 3 SA 106 (A); *Diner's Club South Africa (Pty) Ltd v Durban Engineering (Pty) Ltd* 1980 3 SA 53 (A). The mere fact that the parties had reduced their agreement to writing did not assist the respective courts in determining which type of personal security had been given.

¹²² See 2 3 2 above.

has been concluded in this context. It has been pointed out that Fuller described the channelling function of form as one which distinguishes between enforceable and non-enforceable transactions of the same type. However, Von Jhering ascribed an extra dimension to the channelling function: it also assists in distinguishing between different types of legal transactions. In theory, this characteristic of formalities as a means to “mark off” one type of transaction from another should also assist a court in distinguishing between suretyship and other forms of personal security, since the former must be in writing and the latter may be given orally. Yet this aspect of the channelling function is not borne out in practice. This can be attributed to the fact that the terms “suretyship”, “guarantee” and “indemnity” are used interchangeably,¹²³ which means that the words themselves do not assist the court – it remains necessary to search for the parties’ intention. The task of classification is also not made easier by parties’ tendency to reduce their agreements to writing as a matter of course.¹²⁴ Finally, Von Jhering’s understanding of the channelling function wrongly assumes that everyone knows, and abides by, the rules.

Leaving aside the problems relating to the classification of different forms of personal security, it is not entirely clear why only one form of such security, namely suretyship, should be reduced to writing. Persons who undertake liability as sureties are no more vulnerable to the risk of perjured claims or to making hasty decisions than those who give

¹²³ Forsyth & Pretorius *Suretyship* 32; J T Pretorius “Suretyships and Indemnity” (2001) 13 *SA Merc LJ* 95 96; Grové *Borgstelling* 67-68. Forsyth and Pretorius *Suretyship* 28 n 6 have noted that “the usage of the variants of the word ‘guarantee’ where suretyship is meant is ingrained in the law reports and the written contracts themselves and very difficult to eradicate”. The point is illustrated in *Mouton v Die Mynwerkersunie* 1977 1 SA 119 (A) 138C where Wessels JA said that the word “guarantee” usually means to bind oneself as surety and in *Basil Read (Pty) Ltd v Beta Hotels (Pty) Ltd* 2001 2 SA 760 (C), in which the court held that the “contract guarantee” was “in the nature of a suretyship” (766D). See also the confusing use of terminology in *Carrim v Omar* 2001 4 SA 691 (W) 695H-696D.

¹²⁴ Of course, this statement applies equally to all types of contracts and not merely to those providing personal security. Fridman 1985 *UTLJ* 49 states that “the nature of the transaction, its monetary value, or the character of the parties could render the use of writing to contain or evidence the contract and its terms a practical, everyday necessity”. There is also the common belief that any contract must be in writing in order to be valid, which may explain why parties generally tend to reduce their agreements to writing irrespective whether it is statutorily required (50). See also Kötz *European Contract Law* 1 79-80.

a guarantee.¹²⁵ It does not appear that South African courts have considered the possibility that section 6 of the General Law Amendment Act is in fact broad enough that it could be interpreted to be applicable to all forms of personal security. Such an interpretation would avoid the problems associated with the confusing use of terminology and take into account the policy considerations underlying the imposition of formalities.¹²⁶ The absence of such judicial consideration has meant that at least in some instances, there has been an unnecessary proliferation of litigation and further, resort to the technical defence of non-compliance with statutory formalities in order to escape liability. Both these points are illustrated in the case of *Carrim v Omar*¹²⁷ (“*Carrim*”).

Briefly, the facts of the case are as follows.¹²⁸ Mrs Omar, the respondent, originally invested a sum of money with Volkskas Bank. In terms of the Islamic faith, the interest which accrues on such a deposit is regarded as *haram* and not *halaal*. The respondent accordingly sought to invest her money with an Islamic bank in terms of a *Mudhaarabah* contract.¹²⁹ This investment would be a “nest-egg” for Mrs Omar and provide for her financially upon her husband’s death. Unfortunately, the Islamic bank experienced difficulties and was subsequently liquidated.

The respondent sought to reclaim her investment from the appellant (a director of the Islamic bank) on the basis that he had given an oral guarantee for the capital amount. The

¹²⁵ The same point is made in Forsyth & Pretorius *Suretyship* 26 n 2; S Scott & E Dirix “To Have Your Cake and Eat It [Bespreking van *Carrim v Omar* 2001 4 SA 691 (W)] (2004) 15 *Stell LR* 333 343. Both guaranties and indemnities are required to be in writing in British Columbia in terms of s 59(6) of the Law and Equity Act 1996. This provision is exactly the same as s 5 (1) of the British Columbia Statute of Frauds 1958, in relation to which the Law Reform Commission indicated that it would not distinguish between suretyship and indemnity for the purposes of a writing requirement. Not only was such a distinction illogical in the opinion of the Commission, but the cautionary concern was equally evident in both suretyships and indemnities. See Law Reform Commission of British Columbia *Report on the Statute of Frauds* (1977) Ch 3 E: Guarantees and Indemnities; Fridman 1985 *UTLJ* 54.

¹²⁶ J T Pretorius “Die Formaliteitsvereiste by Borgstelling” (1988) 10 *MB* 122 129; Scott & Dirix 2004 *Stell LR* 343.

¹²⁷ 2001 4 SA 691 (W).

¹²⁸ 732A-E.

¹²⁹ This nature of this type of contract is explained in 731D-F of the majority judgment. The investor’s funds are invested in the bank, who then acts as representative of the investor to grow the funds. No interest is paid, but profits are divided between the bank and the investor. Losses are borne by the investor alone (although the loss may never exceed the capital amount).

appellant in turn argued that if there was a contract between the parties, then that contract was an oral suretyship and therefore void in terms of the relevant statutory formalities.

The majority held that an oral guarantee had been given. Although Scott and Dirix argue that this conclusion is based on factual statements rather than legal reasoning,¹³⁰ it is also true that a *Mudhaarabah* contract merely requires the bank to act as representative of the investor to grow the funds; the investor bears the risk of any loss in the case of a bad investment. Taking this into account, it would not have made sense to conclude a suretyship, because there was no principal obligation created between the bank and the respondent which could be breached so that recourse could be had against the surety.¹³¹

In relation to the writing requirement, the majority merely considered the argument that it might have been prudent for the agreement to have been reduced to writing, but did not take the matter any further.¹³² However, had the agreement been reduced to writing, there might at least have been greater certainty as to its terms, if not its classification, and both parties would have been protected against the possible fraud or perjury of the other.

It has been suggested, rather speculatively, that the reason for the majority's finding in the *Carrim* case had less to do with the existence of evidence supporting such a conclusion and more with the fact that the majority wanted to assist Mrs Omar on the basis of equitable considerations.¹³³ If the majority had concluded that an oral suretyship existed between the parties, then it would have been faced with the problem that there is no recognised exception in South African law to the rule that a suretyship should be in writing. However, on the facts of the case, it was evident that the appellant was not merely a disinterested party, acting out of sentiment. He received certain advantages from his undertaking: the offer of personal security assisted in the recruitment of Mrs Omar as an investor with the bank,¹³⁴ which in turn entitled the appellant to loans from the bank without giving security for such loans. Alternatively, where collateral was required, the accounts of

¹³⁰ 2004 *Stell LR* 340. The reasons for the court's conclusion are summarised in *Carrim v Omar* 2001 4 SA 691 (W) 739I-740C.

¹³¹ *Carrim v Omar* 2001 4 SA 691 (W) 740B; see also C F Forsyth & M du Plessis "Suretyship, Guarantee and Islamic Banking" (2002) 119 *SALJ* 671 673.

¹³² *Carrim v Omar* 2001 4 SA 691 (W) 739A-C.

¹³³ Scott & Dirix 2004 *Stell LR* 340-341.

¹³⁴ *Carrim v Omar* 2001 4 SA 691 (W) 733B.

investors which he had recruited were accepted.¹³⁵ In the absence of a recognised exception, the conclusion that an invalid oral suretyship existed between the parties would have meant that the appellant escaped liability, despite the probability that he had had the serious intention to be bound at the time of contracting. This would have left the respondent without her “nest-egg” and without any recourse against the appellant. It is therefore possible that the majority may have been motivated, if only implicitly, by the awareness that in certain cases statutory formalities may promote, rather than prevent, fraud.

2 4 4 Formalities and the promotion of fraud or unconscionable conduct

When strictly applied, formalities can provide a refuge, by allowing a party to rely on formal incompleteness to escape an oral agreement which was seriously intended.¹³⁶ This is probably one of the “hardships” which Innes J had in mind when he expressed doubts, in *Wilken v Kohler*,¹³⁷ about the desirability of a provision requiring sales of land to be in writing upon pain of nullity.

As will become apparent in subsequent chapters, South African courts vacillate between strict insistence on compliance with formal requirements and an approach which acknowledges that formalism can lead to inequitable results. For example, when it comes to determining with what degree of precision parties must record the terms of their agreement, they have held that meticulous accuracy in the recordal is not required, in spite

¹³⁵ 735B-736J.

¹³⁶ In relation to the English Statute of Frauds, the comment has been made that a strict application of its provisions may encourage rather than prevent fraud - see *Simon v Metivier (or Motivis)* (1766) 1 Wm BI 599 601 per Wilmot J. The same criticism has been lodged against the Statute of Frauds as it is applied in the US (*Brown Corbin on Contracts* 4 6) and against SA legislation prescribing formalities for certain types of contracts (see eg G F Lubbe & C M Murray *Farlam & Hathaway Contract - Cases, Materials and Commentary* 3 ed (1988) 206 n 4; Van Rensburg & Treisman *Guide to the Alienation of Land Act* 23; *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 1 SA 983 (A) 989; *Senekal v Home Sites (Pty) Ltd* 1950 1 SA 139 (W) 150; *Exdev (Pty) Ltd v Pekudei Investments (Pty) Ltd* 2011 2 SA 282 (SCA) para 1. In *Weinerlein v Goch Buildings Ltd* 1925 AD 282, this potential for the abuse of statutory formalities led to the recognition of the remedy of rectification in the context of agreements subject to statutory formalities - see ch 5).

¹³⁷ 1913 AD 135 142. See also the remarks made by the SA Law Revision Committee *Second Report* (15-16 June 1950) para 16, quoted in 2 4 1 above.

of the fact that this is probably the best way to give effect to the evidentiary function.¹³⁸ This more lenient approach has been adopted in order to prevent the relevant legislation being used as an instrument of fraud. In the context of formalities relating to sales of land, Watermeyer CJ stated in *Van Wyk v Rottcher's Saw Mills (Pty) Ltd*¹³⁹ that

“if [the relevant legislation were] to be construed so as to require a written contract of sale to contain, under pain of nullity, a faultless description of the property sold couched in meticulously accurate terms, then such a construction would merely be an encouragement to the dishonest purchaser to escape from his bargain on a technical defect in the description of the property, even in cases where there was no dispute at all between the parties. Such construction would be an encouragement to dishonesty and ... it should be avoided if possible.”¹⁴⁰

However, when it comes to granting remedies to a party to a formally invalid agreement, South African courts have followed a strict interpretation of the consequence of invalidity for non-compliance.¹⁴¹ The general position is that a party is limited to an enrichment remedy to reclaim his performance and is not awarded what he bargained for, in spite of the fact that the other party may have led him to believe that he would abide by the formally defective agreement. Such a restrictive approach does not take into account the possibility that statutory formalities are being abused and that the party raising the defence of non-compliance may have acted unconscionably. Other legal systems afford more explicit recognition to the criticism that formalities can be used as an instrument of fraud and tailor their remedies accordingly.

¹³⁸ *Estate du Toit v Coronation Syndicate, Ltd* 1929 AD 219 224.

¹³⁹ 1948 1 SA 983 (A).

¹⁴⁰ *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 1 SA 983 (A) 989. Ch 3 considers the interpretation of the relevant statutory requirements in greater detail. The current position referred to in the main text is more lenient than was previously the case, where the Appellate Division held that “the subject-matter [in a sale of land] must be defined or described with a degree of precision which will enable it to be identified without recourse to the evidence of the parties concerned”. *Estate du Toit v Coronation Syndicate, Ltd* 1929 AD 219 224, discussed in A J Kerr *The Law of Sale and Lease* 3 ed (2004) 93 ff. Such a strict interpretation not only permits the statutory requirements to be used as instruments of fraud, but also suggests that a higher degree of certainty is required for agreements subject to formalities than for other contracts. See, in this regard, J C de Wet & A H van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 1 5 ed (1992) 324.

¹⁴¹ See ch 6 for further detail.

2 5 Conclusion

The primary object of this chapter has been to provide an overview of the history, purpose, functions and shortcomings of statutory formalities. Formalities may promote certainty, in that compliance with the relevant provisions forces parties to reduce their agreement to writing, with the document serving as evidence of that agreement. The need to reduce an agreement to writing can also draw a party's attention to the fact that he may be assuming a potentially onerous obligation and that he should exercise caution before doing so. Finally, writing can signal the end of the negotiation phase, and serve as a means to distinguish between enforceable and unenforceable transactions (and also, according to some, between different kinds of enforceable transactions).¹⁴²

The advantages of formalities have been set out in detail, because they illustrate why it is permissible to limit contractual freedom in a legal system whose point of departure is that contractual liability is based on the will of the parties.¹⁴³ Fuller noted that the value of contractual autonomy – which underlies the notion of contractual freedom – is only one norm or value in any legal system. It can be outweighed by other concerns, like the need for certainty, protection of parties or the prevention of fraud, when these are prevalent in certain types of transactions.¹⁴⁴

However, as discussed in similar detail above, it is also true that formalities have certain disadvantages.¹⁴⁵ They require skill and technical knowledge which most lay persons do not have, forcing them to resort to legal assistance. The resultant increase in transaction costs has led to the increased use of standard form contracts, which in turn can have negative consequences of its own. In addition, the regular disputes regarding whether there has been sufficient compliance with formal requirements shows that formalities can increase, rather than decrease, litigation. Finally, affording a party the possible escape

¹⁴² These functions are discussed in 2 3 2-2 3 3.

¹⁴³ *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A) 995H-996A.

¹⁴⁴ 1941 *Colum LR* 808; 813-814. See also D Kennedy "From the Will Theory to the Principle of Private Autonomy: Lon Fuller's 'Consideration and Form'" (2000) 100 *Colum LR* 94 131. For this reason, it was argued in ch 1 (1 3 3) that it is unlikely that a challenge to the constitutional validity of statutes imposing formal requirements, upon pain of nullity for non-compliance, would succeed.

¹⁴⁵ See 2 4.

route of non-compliance with statutory formalities means that they can be used as a vehicle for fraud and perjury.

This weighing-up of the functions and dysfunctions of form, and the recognition that the advantages of formalities always come at a cost, is referred to by Kennedy as a “conflicting considerations” analysis.¹⁴⁶ This type of analysis, in the context of formalities, is evident in the work of Von Jhering. He identified the benefits of rules imposing statutory formalities as certainty of transaction and control over judges,¹⁴⁷ but also indicated that these benefits come at the cost of over- and/or under-inclusiveness.¹⁴⁸

Instances of over- and under-inclusiveness have been discussed above.¹⁴⁹ For example, it was pointed out that there are no recognised South African exceptions to the rule that suretyships must be reduced to writing, in spite of the fact that there may be certain fact patterns which indicate that the concerns which formalities are intended to address are not evident or can be addressed in some other way. At the same time, the rule that only suretyships must be reduced to writing is under-inclusive, because it does not extend to other contracts, like guarantees, which are functionally similar and which raise the same policy concerns.

The benefit of subjecting formalities to a conflicting considerations analysis is that it reminds us that

¹⁴⁶ 2000 *Colum LR* 94.

¹⁴⁷ *L'Esprit du Droit Romain dans les Diverses Phases de Son Développement I* 2 ed tr O de Meulenaere (1877) 54 (emphasis in the original):

“En effet, l'importance de cette ... qualité [de la réalisabilité formelle] n'est pas seulement de *faciliter*, de *simplifier*, et par conséquent *d'accélérer* l'application du droit, mais encorer *d'assurer* la réalisation *uniforme* du droit.” (“In effect, the importance of this quality of formal realisability is not only the *facilitation*, *simplification* and as a consequence, *speedy application* of the law, but also the *assurance* of a *uniform application* of the law” – own translation.)

¹⁴⁸ *L'Esprit du Droit Romain I* 54-55, also discussed in Kennedy 2000 *Colum LR* 112; D Kennedy “Form and Substance in Private Law Adjudication” (1975-1976) 89 *Harv LR* 1685 1687-1694. The under- and over-inclusiveness of rules imposing formalities is also implicit in a statement in Zweigert & Kötz *Comparative Law* 375: “provisions regarding form often cut more deeply than is required to implement the underlying policy grounds”.

¹⁴⁹ See 2 3 4 and 2 4 3.

“it never makes sense to justify a rule by appeal to its administrability - one must always add: and its acceptable cost in over- or under-inclusiveness.”¹⁵⁰

It also reminds us that, at a more abstract level, the treatment of formal requirements reveals the tension between formalism and flexibility:

“[Formalism] makes for certainty of the law, [flexibility] for equity – the two principles on which justice is based. These principles are antagonistic. Yet [a] legal system must try to realize both simultaneously. That makes ideal justice a Utopian idea, for the one principle must always be precariously balanced against the other. To carry through the one without any regard to the other would lead to extreme injustice: *summum ius summa iniuria*.”¹⁵¹

It is argued that these conflicting considerations (however they may be worded) should inform every judgment in which formal requirements are at issue. Sometimes it is necessary to give effect to the policy considerations underlying the imposition of formalities. On other occasions, it may be that the dysfunctions of form are such that a strict interpretation of the formal requirements may promote an inequitable result. Therefore, the following chapters, while focusing on the black-letter rules of formal requirements, will also examine the curial treatment of formalities in the light of these conflicting considerations.

¹⁵⁰ Kennedy 2000 *Colum LR* 113. Note that while Fuller viewed the conflict as existing between the functions of formalities on the one hand and private autonomy on the other, he seems to have missed the point that a conflict also exists between the functions and dysfunctions of form itself (138-139).

¹⁵¹ Zimmermann *Law of Obligations* 88-89 (italics added; footnote omitted).

CHAPTER 3: THE INTERPRETATION OF FORMAL REQUIREMENTS

3 1 Introduction

In the previous chapter, we saw that despite differing historical motivations for the imposition of formal requirements, South African, English and German law all prescribe formalities for sales of land and suretyships. While the same types of transactions are subject to formalities, the degree of formality can vary from one system to another and from one type of transaction to another.¹

In England, a mere memorandum or note is sufficient to render a guarantee enforceable,² while a contract including all the express terms of the agreement is necessary for a valid sale of land.³ In Germany, a declaration of suretyship must also be in writing,⁴ whereas the sale of land must meet the stricter requirement of notarial authentication.⁵ No distinction is drawn between the formal requirements for suretyships and sales of land in South Africa: both must be in writing in order to be valid.⁶ In all legal systems, the signature of one or both parties is also required.

The purpose of this chapter is to examine the judicial interpretation of some of these provisions. It commences by drawing basic distinctions which are essential to understanding the South African interpretation of the formal requirements under consideration.⁷ The discussion then moves on to case law which illustrates what must appear in a suretyship or sale of land in order to ensure that these transactions are formally valid.⁸ Finally, the chapter concludes by examining various aspects related to the requirement that the document must be signed by one or both parties.⁹

¹ The relevant legislative provisions are reproduced in Addendum A.

² S 4 of the Statute of Frauds.

³ S 2 of the Law of Property (Miscellaneous Provisions) Act.

⁴ § 766 BGB.

⁵ § 311b.

⁶ S 2(1) of the Alienation of Land Act; s 6 of the General Law Amendment Act.

⁷ 3 2.

⁸ 3 3.

⁹ 3 4.

Before considering these aspects in greater detail, the following three observations must be made. First, this chapter does not purport to deal with each and every problem which has confronted a court in interpreting a statutory provision imposing formal requirements. Not only would this be an almost impossible task, but it would not serve the purpose of providing a general overview of the judicial interpretation of legislation imposing formalities. Secondly, and also in the light of this purpose, the discussion which follows is more descriptive than in subsequent chapters. The goal is to set out what should appear in the written agreement; the reasons why courts have come to their conclusions, and the interaction between these conclusions and other aspects of contract law, are largely dealt with in other chapters. It will be necessary however, to make certain remarks which anticipate topics explained in greater detail later, in order to contextualise the interpretation which is the topic here. Finally, the primary focus is on South African law and comparative observations are limited chiefly to those that illuminate the South African approach. The advantages and disadvantages of this approach compared to that of other legal systems can really only be appreciated if it is clearly understood in the first place.

3 2 Some basic distinctions

3 2 1 The nature of the written document: contract or memorandum?

Despite the differences in wording, both section 2(1) of the Alienation of Land Act¹⁰ and section 6 of the General Law Amendment Act require that the parties' agreement must be in writing in order to be valid.¹¹ By contrast, the Statute of Frauds envisages two alternative means to comply with its provisions: either the parties' agreement is reduced to writing, or there must be some note or memorandum of it. Implicit in these two alternatives

¹⁰ Read together with the definition of "alienation" and "deed of alienation" in s 1. A J Kerr *The Law of Sale and Lease* 3 ed (2004) 82 has criticised the Act's definition of "alienation": it does not denote the transfer of ownership but rather a sale, exchange or donation. The writer argues further that the statutory description of a "contract" is also contrary to ordinary legal usage (83), because it appears to be limited to "a deed of alienation under which land is sold against payment by the purchaser to, or to any person on behalf of, the seller of an amount of money in more than two instalments over a period exceeding one year" (see s 1 and Addendum A). For these reasons, Kerr suggests an alternative formulation of s 2(1):

"No sale, exchange, or donation of land ... shall be of any force or effect unless it is contained in a written document or documents signed ..." (83, footnote omitted).

¹¹ R H Christie & G B Bradfield *Christie's The Law of Contract in South Africa* 6 ed (2011) 131; *Fourlame (Pty) Ltd v Maddison* 1977 1 SA 333 (A) 341D-342H.

is the notion that an agreement in writing and a mere note or memorandum are not the same type of recordal.¹²

The distinction between a written contract and a memorandum has also been recognised in South African law, at least as early as 1898. In *Richmond v Grofton*,¹³ De Villiers CJ stated:

“The English cases in the construction of the Statute of Frauds do not assist the Court in construing the meaning of the terms ‘contract in writing’ ... In the case of [*In Re New Eberhardt Company* (1890) LR 43 ChD 118], the question arose whether a ‘contract in writing’ had been registered within the meaning of the Companies Act [1867], and Lord Justice Fry made the following observations:

‘Nothing can be more different than the language of this statute and the language of the Statute of Frauds. That is satisfied if the contract be in writing, or if the memorandum of the contract be in writing signed by the party to be charged therewith, but here the contract must be in writing, by which I understand that both parties to the contract must signify their assent to the terms of it in writing, and that without going beyond the writing you can see the existence of the contract between the contracting parties.’ [130]”¹⁴

Leaving aside for the time being the reference to a signature as a means to indicate assent to the terms contained in the written document,¹⁵ it is apparent from Lord Fry’s statement that when a contract is required to be in writing, the contract itself should be embodied in the document. It must reflect the parties’ intention to contract.¹⁶

This conclusion is also evident in *Jackson v Weilbach’s Executrix*¹⁷ (“*Jackson*”). The court was confronted with the question whether the declarations of the purchaser and seller made for transfer duty purposes constituted a written “contract of sale of fixed property” as required by section 30 of Proclamation 8 of 1902:

¹² *Elpis Maritime Co Ltd v Marti Chartering Co Inc* [1991] 2 Lloyd’s Rep 311 314.

¹³ (1898) 15 SC 183.

¹⁴ 187-188.

¹⁵ See 3 4 below.

¹⁶ See also *Christie & Bradfield Contract* 119.

¹⁷ 1907 TS 212.

“But do these declarations of purchaser and seller constitute such a contract? In form they certainly do not; the declaration of the seller is not an offer, and the declaration of the purchaser is not an acceptance. Nor is there anything to show that the parties, when they signed these declarations, intended to enter into any contract. The declarations were signed for revenue purposes, and they purport not to embody a contract constituted in terms of the documents themselves, but to record that a prior contract had been entered into at a date therein mentioned.”¹⁸

Similarly, in *Raywood v Short*¹⁹ (“*Raywood*”) Solomon J concluded that a receipt for payment of the purchase price

“was merely a certificate acknowledging that £90 had been paid as the purchase-price of the two stands ... [T]here had been a verbal sale some months before; but no amount of evidence to prove a verbal contract can supply the defect that the contract was not in writing ... If the provisions of our law were the same as those of the Statute of Frauds, it might perhaps have been said that the document was a ‘note or memorandum of the contract signed by the party to be charged therewith.’ As our law, however, contains no similar provision it [is] unnecessary to consider that point.”²⁰

Thus, where section 2(1) of the Alienation of Land Act prescribes that the contract must appear in a deed of alienation, it means that the recordal itself must embody the parties’ *animus contrahendi*.²¹ This may be achieved either by incorporating the parties’ common intention to be bound in one document²² or by recording the parties’ respective

¹⁸ 216.

¹⁹ 1904 TH 218.

²⁰ 222.

²¹ At first glance, it may appear somewhat odd that decisions concerning formal requirements imposed for sales of land under earlier legislation are relied upon to interpret s 2(1) of the Alienation of Land Act. However, these older decisions are still relevant today, because the meaning and purpose of formal requirements imposed for alienations of land have remained the same over time (*Just Names Properties 11 CC v Fourie* 2007 3 SA 1 (W) para 30; *Headerman (Vryburg) (Pty) Ltd v Ping Bai* 1997 3 SA 1004 (SCA) 1008I). See also *Legator McKenna Inc v Shea* 2010 1 SA 35 (SCA) para 18 (in which the court specifically relied upon *Jackson v Weilbach’s Executrix* 1907 TS 212 to support its conclusion that the execution of conveyancing documents does not constitute a written acceptance as required by the Alienation of Land Act).

²² See eg *Poole and McLennan v Nourse* 1918 AD 404 416; *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 3 SA 986 (SCA) para 3.

declarations of intention (ie a written offer and written acceptance)²³ so that a contract is constituted by reading the two documents together. In *Hirschowitz v Moolman*,²⁴ the rule that the parties' agreement must be reduced to writing was held to be applicable also to an agreement creating a right of pre-emption, in spite of the fact that such an agreement does not constitute an "alienation",²⁵ in order to prevent the circumvention of formalities by means of the so-called *Oryx* mechanism (which allows the holder of a right of pre-emption to conclude an agreement of sale with the grantor of the right in the event that the latter infringes that right²⁶). However, the court's conclusion was formulated in broad terms:

"In general a *pactum de contrahendo* is required to comply with the requisites for validity, including requirements as to form, applicable to the second or main contract to which the parties have bound themselves" (766D).

Upon a literal interpretation, this statement would apply equally to an option (which is also a *pactum de contrahendo*), although theoretically only that part of the option which consists of the substantive offer (and the acceptance of that offer) should be in writing and not also the agreement to keep the offer open.²⁷ Therefore, a document which fails to reflect the parties' intention to create a right of pre-emption will be invalid. Similarly, a document which fails to embody an agreement to keep open an offer to alienate, may also be invalid.

²³ *Trever Investments (Pty) Ltd v Friedhelm Investments (Pty) Ltd* 1982 1 SA 7 (A) 18D; *Legator McKenna Inc v Shea* 2010 1 SA 35 (SCA) para 18.

²⁴ 1985 3 SA 739 (A) 767F-H.

²⁵ The SA approach to agreements creating rights of pre-emption should be contrasted with the approach to other types of agreements where the transfer of land is involved, but which do not have to be in writing because they are regarded as falling outside the definition of "alienation". These agreements are discussed in Kerr *Sale and Lease* 78-79; A D J van Rensburg & S H Treisman *The Practitioner's Guide to the Alienation of Land Act* 2 ed (1984) 35-36; Christie & Bradfield *Contract* 116-117. The list includes service contracts where a transfer of land is promised as remuneration, an undertaking to transfer land in exchange for a loan and the transfer of land as a prize for winning a competition.

²⁶ *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 3 SA 893 (A) 907E.

²⁷ For support of this argument and criticism of *Hirschowitz v Moolman* 1985 3 SA 739 (A) in general, see eg G F Lubbe & C M Murray *Farlam & Hathaway Contract - Cases, Materials and Commentary* 3 ed (1988) 93 n 5; G F Lubbe "Law of Purchase and Sale" 1985 ASSAL 133 140-142; A D J van Rensburg "Formaliteitsvoorskrifte, Voorkoopregte en Opsies" (1986) 49 THRHR 208; S W J van der Merwe, L F van Huyssteen, M F B Reinecke & G F Lubbe *Contract: General Principles* 4 ed (2012) 70-71, 74-75.

It has in fact been held that a receipt constitutes a sufficient memorandum of the agreement between the parties in terms of the Statute of Frauds.²⁸ The same conclusion has been drawn in relation to a letter written to an agent²⁹ or a recital in a will.³⁰ In none of these cases did the English courts require that an intention to contract must be embodied in the document.³¹ As stated in *Re Hoyle*:³²

“The Court is not in quest of the intention of parties, but only of evidence under the hand of one of the parties to the contract that he has entered into it. Any document signed by him and containing the terms of the contract is sufficient for that purpose.”³³

A memorandum therefore does not need to reflect the parties' intention to contract but simply the fact that there was this intention at some stage prior to the creation of the document. It acts as evidence of the parties' prior verbal agreement, rather than the embodiment of their agreement. Although South African courts do not appear to be inclined to refer to a document which is drawn up unilaterally and signed by one party to an agreement as a memorandum, cases like *Jackson* and *Raywood* reflect the perception that such documents generally do not constitute the embodiment of the parties' agreement.³⁴ As a result, and irrespective of the label, both South African and common-law courts recognise that the limitations on the use of extrinsic evidence discussed in the next chapter do not apply to these types of unilateral documents.³⁵

²⁸ *Beckett v Nurse* [1948] KB 535. See also *Auerbach v Nelson* [1919] 2 Ch 383, in which the court was required to consider whether the description of property contained in a receipt was sufficiently ascertainable. At no point in the judgment did the court question whether a receipt itself could constitute a sufficient memorandum.

²⁹ *Gibson v Holland* (1865-66) LR 1 CP 1.

³⁰ *Re Hoyle* [1893] 1 Ch 84.

³¹ *Beckett v Nurse* [1948] KB 535 537-538 per Tucker LJ, 540 per Jenkins LJ; *Gibson v Holland* (1865-66) LR 1 CP 1 8; *Re Hoyle* [1893] 1 Ch 84 98 per Lindley LJ; 99 per Bowen LJ; 100 per Smith LJ.

³² [1893] 1 Ch 84.

³³ 99 per Bowen LJ.

³⁴ This is not an invariable rule, as will become apparent further below in the main text.

³⁵ For SA, see *Cunningham v Holcroft* 1907 TS 251 252-253; *Arthur v Central News Agency, Ltd* 1925 TPD 588 593-594; *Weintraub v Oxford Brick Works (Pty) Ltd* 1948 1 SA 1090 (T) 1092-1093; Van der Merwe et al *Contract* 150-151; Christie & Bradfield *Contract* 202-203. For the common-law position, see eg J H Chadbourn *Evidence in Trials at Common Law by John Henry Wigmore* 9 (1981) § 2454; *Beckett v Nurse* [1948] KB 535 540-541 per Jenkins LJ; *Wemhoff v Investors Management Corporation of America* 528 A 2d 1205 (1987) 1207 in which the court quoted *Hackney v Morelite Construction* 418 A 2d 1062 (1980) 1065 n 1 (emphasis in the original):

The distinction between a contract in writing and a unilateral document not intended to constitute the embodiment of an agreement (or memorandum in the English sense) requires some elaboration in the context of suretyships. It was stated above that section 6 of the General Law Amendment Act requires that the terms of a “contract of suretyship” must be in writing. A literal interpretation of this provision suggests that the parties should conclude an agreement and record this agreement in a document.³⁶ However, it seems that it is only the surety’s declaration of intent which must take a written form.

This is most clearly illustrated in *Jurgens v Volkskas Bank Ltd*³⁷ (“*Jurgens*”) in which the respondent creditor sent printed bank forms containing blank spaces, designed to be completed as suretyships, to the appellants. Relevant for the purposes of this discussion is the court’s characterisation of the documents once these were completed:

“It is trite that an offer cannot be accepted unless and until it has been brought to the attention of the offeree ... A prerequisite for a contract of suretyship is that the offer communicated by the would-be surety to the creditor must be complete. In the instant case, so it seems to me, the appellants communicated their offers to the respondent when the documents in question, duly filled in, were delivered by or on behalf of the appellants to the respondent. It cannot be suggested that, on the face of them, these offers were in any respect incomplete. At that juncture they contained the terms essential for the [formal] validity of a contract of suretyship ... Each ... document bore the signatures of those of the appellants named therein. It is not in dispute that the suretyships thus delivered to the respondent were accepted by it.”³⁸

While it may not have been in dispute that the offers of suretyship were accepted by the creditor, the judgment does not clarify how this acceptance took place. Statements made

“The relationship between the parol evidence rule and the [S]tatute of [F]rauds frequently has been made more intimate than either rule requires. The former bars the admission of prior written or prior or contemporaneous oral evidence that adds to or is inconsistent with the terms of a written document that constitutes a complete and final (integrated) statement of the parties’ agreement. The latter bars enforcement of certain oral agreements unless there is a written memorandum signed by the party to be charged ... [T]he statute ... does *not* require an exhaustive, integrated statement of the agreement in writing, but only a sufficient statement to establish that there in fact was an agreement and that the party charged should be bound by it.”

³⁶ *Fourlameel (Pty) Ltd v Maddison* 1977 1 SA 333 (A) 341G-H.

³⁷ 1993 1 SA 214 (A).

³⁸ 218I-219E.

in subsequent case law and academic commentary imply that the suretyships were signed by the creditor,³⁹ but there is no indication in *Jurgens* that the creditor signified his acceptance in this manner. In fact, it has been argued that a written offer to stand surety, like a written offer to donate falling within the ambit of section 5 of the General Law Amendment Act, may be accepted orally or even tacitly.⁴⁰ It would therefore appear that the formal validity of a suretyship is determined solely on the basis of a written declaration of intent by the surety, provided that that declaration is complete by the time of delivery to the creditor and provided it is accepted by the latter, albeit not necessarily in writing. This conclusion raises two questions. First, is it possible to reconcile the decision in *Jurgens* with those cases dealing with alienations of land which have held that there must be a written offer and a written acceptance in order to comply with a formal requirement that the contract must be in writing? Secondly, how does a declaration of intent by the surety in any event comply with section 6, which requires that a “contract of suretyship” must be recorded in writing?

With regard to the first question, it should be pointed out that the court in *Jurgens* was not of the opinion that a unilateral undertaking by a surety is sufficient to constitute an agreement. In fact, it emphasised that a suretyship, like a sale of land for example, is a bilateral legal act: it is based on an agreement between a creditor and a surety.⁴¹ It is argued that the apparent anomaly which arises between cases dealing with alienations of land and the conclusion drawn in *Jurgens* may be explained on the basis that while both types of contract are based on agreement, the former usually consists of reciprocal performances⁴² while the latter deals only with the unilateral performance of the surety.⁴³

³⁹ *Fraser v Viljoen* 2008 4 SA 106 (SCA) para 4; D J Lötze “The Law of Purchase and Sale” 2008 ASSAL 1058 1059.

⁴⁰ See P R Owens & H Daniels “Donations” in W A Joubert (ed) *LAWSA* 8(1) 2 ed (2005) para 305.

⁴¹ *Jurgens v Volkskas Bank Ltd* 1993 1 SA 214 (A) 218I; *African Life Property Holdings (Pty) Ltd v Score Food Holdings Ltd* 1995 2 SA 230 (A) 239A-B; C F Forsyth & J T Pretorius *Caney’s The Law of Suretyship* 6 ed (2010) 61. The statement in the main text may appear trite, but there is case law which suggests that a unilateral undertaking to stand surety, provided it is clear and unequivocal, is sufficient to impose obligations (see eg *Bouwer v Lichtenburg Co-Operative Society* 1925 TPD 144 148; *Federated Timbers (Pretoria) (Pty) Ltd v Fourie* 1978 1 SA 292 (T) 297B-C).

⁴² The one exception to this analysis would be donations of land, which are also defined as an “alienation” in terms of s 1 of the Alienation of Land Act. Both the offer to donate and its acceptance would have to be in writing. However, this does not imply that the performance in terms of a donation of land is not unilateral. Rather, it has to do with the fact that s 2(1) of the Alienation of Land Act specifies that both the donor and the

It is necessary for both parties to an alienation to reduce their declarations of intent to writing, because this ensures that certainty is achieved regarding their respective obligations.⁴⁴ If the performance is unilateral, such as a surety's, then it is that performance which must be rendered certain by reduction to writing, so that the surety may be protected from fraudulent claims and in order to warn him about the onerous nature of his performance. It is presumably for this reason that section 6 prescribes that the surety alone must sign the document and it is also presumably for this reason that it is sufficient if only the surety's declaration of intent has been reduced to writing, in spite of the fact that a suretyship is based on agreement and not a unilateral intention to be bound on the part of the surety.⁴⁵

The court in *Jurgens* does not explain how a document which is signed by the surety alone and which therefore appears to record only his declaration of intent, can constitute a "contract of suretyship" and not a memorandum in the English sense or the equivalent unilateral record in the South African sense. However, it has been stated elsewhere that

"[t]he mere fact that the document is signed by only one party does not prove that it is a unilateral act, for there may be a second party who acts on the face of it as part of a transaction. That being so, the fact that a document is not signed by [one of the parties is] ... not decisive. The real question is whether the parties intended the [document] to record the terms of the [agreement]".⁴⁶

donee must sign the deed of alienation. It is possible that the legislature envisaged that in the context of the alienation of land, a donee would have to undertake certain obligations which, although not rendering the donation reciprocal, nevertheless require the certainty that a written record of those obligations would promote. An example of such a donation may be found in *Scholtz v Scholtz* 2012 5 SA 230 (SCA) para 3, in which the donee was required to pay the costs of transfer involved in registering the donated property.

⁴³ Forsyth & Pretorius *Suretyship* 36.

⁴⁴ *Trevel Investments (Pty) Ltd v Friedhelm Investments (Pty) Ltd* 1982 1 SA 7 (A) 18D-E.

⁴⁵ Cf § 766 BGB sentence 1: only the surety's declaration of intent is required to be in writing, but this does not change the fact that a suretyship is based on consensus and that there must be some form of acceptance, whether oral or tacit, on the part of the creditor. See M Habersack "§ 766" in M Habersack (ed) *Münchener Kommentar zum Bürgerlichen Gesetzbuch 5 Besonderer Teil III: §§ 705-853* 5 ed (2009) nn 5, 26.

⁴⁶ *Union Government (Minister of Finance) v Chatwin* 1913 TPD 317 321. The case dealt with a mortgage bond, but the same conclusion has been reached in relation to a document recording a suretyship. See the unreported judgment of *Union Bank of S. A. Ltd v Shatz* TPD, April 1940 (the judgment is available at the library of the North Gauteng High Court in Pretoria).

And in *Baker v Afrikaanse Nasionale Afslaers en Agentskap Maatskappy (Edms.) Bpk.*,⁴⁷ it was held that

“een of beide partye mag op ander maniere as deur hul handtekening te kenne gee dat hul ooreenkom op terme wat in ‘n geskrif vervat is; en as hul weersydse instemming met die skriftelike terme dan bewys word, is hul net soseer daaraan gebonde asof hul dit onderteken het.”⁴⁸

These cases admittedly did not focus specifically on formal requirements. Nevertheless, this does not detract from the point that a document which appears to record a declaration of intent by one party can amount to the recordal of a contract.⁴⁹ Provided the parties intended the document to constitute or embody their agreement, a court will give effect to that intention. It is argued that this conclusion is also applicable to the facts of the *Jurgens* case. There, written offers containing all the material terms of the envisaged agreement were delivered to the creditor for his acceptance. Since these offers were accepted, the inference is that the parties intended that the declarations by the sureties would constitute the complete record of the suretyship agreements.

It is argued further that the *Jurgens* case should not be seen as supporting a conclusion that the South African equivalent of a memorandum is sufficient for the purposes of compliance with section 6 of the General Law Amendment Act. Not only were the written offers of suretyship made with the requisite intention to contract (an intention which is absent from either a unilateral recordal or memorandum), but they were also accompanied by the intention that they would constitute the sole memorial of the parties' agreement upon acceptance. For this reason, the parol evidence rule is applicable to suretyships but not, as stated above, to memoranda as required by the Statute of Frauds or their South African equivalent.

This discussion has referred to the Statute of Frauds in general terms. However, the Statute now applies only to guarantees (suretyships in South African law).⁵⁰ That part of

⁴⁷ 1951 3 SA 371 (AD).

⁴⁸ 375G-H.

⁴⁹ See also Christie & Bradfield *Contract* 202-203.

⁵⁰ See ch 2 (2 2).

the Statute which related to alienations of land was re-enacted in section 40(1) of the Law of Property Act 1925.⁵¹ According to this provision, both parties to a sale of land would only be bound if each of them, at the very least, signed a memorandum. If the purchaser alone signed a memorandum, then only he could be sued – the agreement would be unenforceable against the seller. This potentially lopsided effect of section 40 was one of the most significant reasons motivating the English Law Commission to suggest that formalities relating to sales of land should be amended.⁵²

The Law Commission's recommendations resulted in section 2 of the Law of Property (Miscellaneous Provisions) Act. It is no longer sufficient to prove the existence of a memorandum – there must be a contract, containing all the express terms of the parties' agreement and signed by or on behalf of both parties.⁵³ While the Act permits the contract to consist of more than one document,⁵⁴ it presupposes that the document containing the terms, or the reference to another document recording the terms, will be signed by both parties (unless contracts are exchanged).⁵⁵ Like their South African counterparts, English courts now also require that a recordal for the sale of land must embody the parties' intention to contract.⁵⁶

To summarise: when a formal requirement prescribes that the parties' agreement be in writing, it is insufficient to provide a recordal that merely serves as evidence of the fact that an oral agreement has been concluded some time prior to the recordal. Rather, the document must embody the parties' consensus. If the contract is one in which

⁵¹ See Addendum A.

⁵² See, in particular, *Formalities for Contracts for Sale etc of Land (Working Paper No 92)* (1985) para 3.2 and *Formalities for Contracts for Sale etc of Land (Law Com No 164)* (1987) paras 1.7, 4.8. Another important reason for the suggested amendment related to the uncertainty created by the doctrine of part performance. This is discussed in ch 6 (6 4 2). The initial impetus for the Law Commission's investigation however, was the decision in *Law v Jones* [1974] Ch 112 124, in which it was held that a document marked "subject to contract" could constitute a sufficient memorandum (see *Formalities for Contracts for Sale etc of Land (Working Paper No 92)* (1985) paras 1.3-1.6). Although this decision was apparently overturned in *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch 146 160, 165, the Law Commission nevertheless continued with its project for the reasons stated above.

⁵³ S 2(1).

⁵⁴ S 2(2).

⁵⁵ S 2(3).

⁵⁶ See *Firstpost Homes Ltd v Johnson* [1995] 1 WLR 1567 1573; *Ruddick v Ormston* [2006] 1 P & CR DG 21 D 58; *Frances v Berndes Limited* 2011 WL 5903330 para 36.

performances are reciprocal, this requirement is only met if that common intention is embodied in a single document or alternatively, when each party's declaration of intent has been reduced to writing and reflects the conclusion of a written contract. Where a contract requires a unilateral performance, like a suretyship for example, it appears as if it is usually sufficient that only the declaration of the party who is required to perform is reduced to writing. In this type of case, it is argued that despite the fact that the document ostensibly records a unilateral declaration, it will nevertheless amount to an embodiment of a concluded contract if the parties intended this consequence.

3 2 2 Material and non-material terms

In addition to reflecting the parties' *animus contrahendi*, it has also been held by South African courts that an agreement subject to formalities must contain all the material terms of the agreement.⁵⁷ It is settled that this means, at the very least, that the *essentialia* of a suretyship or sale of land respectively should be reflected in the written agreement.⁵⁸ *Essentialia* are those terms which indicate that an agreement belongs to a particular class of contract.⁵⁹ The requirement does not apply to the *naturalia* of the contract, because these are incorporated automatically due to the fact that the agreement falls within a particular class of contract.⁶⁰ It is unclear however, which other terms are required to appear in writing. This is largely due to the fact that there is no fixed definition of what constitutes a non-essential, albeit material, term.⁶¹

⁵⁷ For more recent statements by the Supreme Court of Appeal confirming this requirement, see *Stalwo (Pty) Ltd v Wary Holdings (Pty)* 2008 1 SA 654 (SCA) para 7 (sale of land); *Industrial Development Corporation of SA (Pty) Ltd v Silver* 2003 1 SA 365 (SCA) para 5 (suretyship); *Scholtz v Scholtz* 2012 5 SA 230 (SCA) para 9 (executory donations).

⁵⁸ Particularly authoritative decisions in this regard include *Sapirstein v Anglo African Shipping Co (SA) Ltd* 1978 4 SA 1 (A) 12B-C (suretyship) and *Johnston v Leal* 1980 3 SA 927 (A) 937H (land).

⁵⁹ Van der Merwe et al *Contract* 245.

⁶⁰ Van der Merwe et al *Contract* 246; Van Rensburg & Treisman *Guide to the Alienation of Land Act* 50-51; Kerr *Sale and Lease* 84; *Jones v Wykland Properties* 1998 2 SA 355 (C) 359A; *Just Names Properties 11 CC v Fourie* 2007 3 SA 1 (W) para 33.

⁶¹ It should be pointed out that a material term in this context is not one which is so important that the innocent party cannot reasonably be expected to abide by the contract if the term is breached and which therefore justifies cancellation of the contract (see also Van Rensburg & Treisman *Guide to the Alienation of Land Act* 52). For this alternative meaning of a material term, see C Maxwell "Obligations and Terms" in D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 2 ed (2012) 233 248.

For example, a material term has been described as one

“agreed upon as such and intended by the parties to be incorporated in their agreement”,⁶²

or

“which the parties regard as important enough to insert in their contract”,⁶³

or which passes the following test:

- “(a) did the parties apply their minds to the term [and]
- (b) did they agree, either expressly or impliedly,
 - (i) that the term should form part of their contract; and
 - (ii) be binding on them?”⁶⁴

Possibly the most useful definition of a material term is reflected in the judgment of Jajbhay J in *Just Names Properties 11 CC v Fourie*⁶⁵ (“*Just Names*”):

“To my mind the question is not whether the parties regarded the term as material and as one to be incorporated in writing. The issue is whether they intended a particular aspect of their relationship to be governed by a special provision agreed upon by themselves rather than by the *naturalia* of the agreement or the general principles of contract. If so, the term in question is a material one as regards the particular contract and one which, on account of the need to achieve certainty in respect of transactions governed by the formalities legislation, is required to be in writing”.⁶⁶

⁶² *Mulder v Van Eyk* 1984 4 SA 204 (E) 206A.

⁶³ P M Wulfsohn *Formalities in respect of Contracts of Sale of Land Act (71 of 1969)* (1980) 75. See also *Raven Estates v Miller* 1984 1 SA 251 (W) 256B.

⁶⁴ *Jones v Wykland Properties* 1998 2 SA 355 (C) 359A.

⁶⁵ 2007 3 SA 1 (W).

⁶⁶ *Just Names Properties 11 CC v Fourie* 2007 3 SA 1 (W) para 33. This aspect of the judgment was not discussed on appeal in *Just Names Properties 11 CC v Fourie* 2008 1 SA 343 (SCA), but it does find approval in academic commentary: see T Naudé “The Law of Purchase and Sale” 2007 ASSAL 1039 1048-1049. The rather cryptic reference to “general principles of contract” presumably means the remedies which arise upon breach of contract and the prerequisites for their enforcement. See Van Rensburg & Treisman *Guide to the Alienation of Land Act* 39, 51-52 and the reference to this source in *Just Names Properties 11 CC v Fourie* 2007 3 SA 1 (W) para 33. It is unclear why the court regarded these remedies and the rules for their enforcement as requiring a separate category of “general principles of contract” and not simply falling within the scope of *naturalia*.

This suggests that material terms are all the *incidentalia* agreed upon by the parties: additional terms which supplement the *essentialia* and *naturalia* or which vary the *naturalia* of the agreement.⁶⁷ They would include terms which regulate the time, place and manner of performance; qualify the duty to perform (like a suspensive condition); or set out special remedies in the event of breach of contract and the requirements for their enforcement. According to academic opinion, immaterial terms would then be those terms which relate to the provision of information only.⁶⁸ Both types of terms are required to be in a written agreement of sale of land used, or intended to be used, mainly for residential purposes and which is paid for in more than two instalments over a period exceeding one year.⁶⁹ Presumably immaterial terms are required to be reduced to writing in that context in order to fulfil the protective purpose underlying chapter II of the Alienation of Land Act.⁷⁰

Although it assists in determining what constitutes a material term, the quotation from *Just Names* does create the impression that the failure to include such a term in the written agreement would render it formally invalid.⁷¹ By contrast, the current approach to the determination of formal validity focuses on the written agreement itself in order to establish whether the parties intended to include certain material terms.⁷² If there is no indication of such an intention *ex facie* the recordal, then the fact that the parties have orally agreed upon a material term is irrelevant. This does not mean that the omitted term is not material; it simply means that a party will need to seek rectification of the written agreement in order to include the omitted material term in the agreement so that it may be enforced.⁷³

⁶⁷ See also van der Merwe et al *Contract* 146 n 135, 247; Lubbe & Murray *Contract* 199 n 4.

⁶⁸ Van Rensburg & Treisman *Guide to the Alienation of Land Act* 52; Lubbe & Murray *Contract* 199 n 4.

⁶⁹ See s 6 and the definition of “land” and “contract” in s 1. Ss 6(1)(g), 6(1)(l) and 6(1)(m) appear to be material terms as defined in *Just Names Properties 11 CC v Fourie* 2007 3 SA 1 (W) para 33, while others like s 6(1)(t)(i-vi) provide information only (and would therefore appear to be immaterial terms).

⁷⁰ *Merry Hill (Pty) Ltd v Engelbrecht* 2008 2 SA 544 (SCA) para 13.

⁷¹ The distinction between formal and substantive validity is explained further in ch 4 (4 3 4). Briefly, an agreement is formally valid if it complies with formalities; it is substantively valid if it (also) complies with the other requirements imposed for contractual validity. See Van der Merwe et al *Contract* 157-158.

⁷² See ch 4 (4 3 4).

⁷³ See ch 5 for the discussion of the SA approach to the rectification of agreements subject to formalities.

This analysis also explains apparently contradictory case law. For example, certain judgments have held that the manner of payment of the purchase price is a material term in an agreement for the sale of land,⁷⁴ while others have held that the failure to include such a term in the written agreement does not render it formally invalid.⁷⁵ A closer examination of the cases falling within the former category however, reveals that in each case, the parties had included in the written agreement a material term which attempted to govern how the purchase price would be paid.⁷⁶ Because the content of this term was not objectively ascertainable, the respective agreements did not comply with formalities. Thus, in *Patel v Adam*⁷⁷ the court stated:

“In the agreement in issue in the present case, clause 3 provides that the purchase price ‘shall be payable in monthly instalments free of interest’. The clause contains no statement of the amount of the monthly instalments, and there are no other provisions in the agreement from which the amount, or the period in which the purchase price has to be paid, can be inferred. The agreement, it seems clear, leaves it to the purchaser alone to decide what amount he wishes to pay every month, with the result that a court of law would not be able to determine the monthly amount to be paid by him.”⁷⁸

In those cases which have held that the failure to indicate the manner of payment of the purchase price was not destructive of the agreement’s validity, there was no evidence in the document itself that the parties had attempted to include such a term. In *Herselman v Orpen*,⁷⁹ for instance, the parties’ agreement simply read

“I, Dorrien Arthur Geard Orpen, hereby axcept (*sic*) the offer of R100000 for [Erf 1675, Walmer], that is at present registered in my name, from Mr P R Herselman.”⁸⁰

This led to the inference that the parties did not intend to regulate the manner in which payment would occur and further, that this matter would be governed by the *naturalia* of the contract.⁸¹

⁷⁴ See eg *Jammie v Lowrie* 1958 2 SA 430 (T); *Patel v Adam* 1977 2 SA 653 (A).

⁷⁵ See eg *Venter v Liebenberg* 1954 3 SA 333 (T); *Herselman v Orpen* 1989 4 SA 1000 (SE).

⁷⁶ *Jammie v Lowrie* 1958 2 SA 430 (T) 431A; *Patel v Adam* 1977 2 SA 653 (A) 664A.

⁷⁷ 1977 2 SA 653 (A).

⁷⁸ 666A-C.

⁷⁹ 1989 4 SA 1000 (SE).

⁸⁰ 1002E.

It is suggested, accordingly, that broad statements to the effect that the manner of payment of the purchase price or that the time by which payment should be made are (always) material terms of a sale of land should be approached with caution.⁸² What is required is an examination of the written agreement itself in order to determine whether the parties had attempted to regulate these matters in writing. In the absence of such an indication, the inference is that the parties were content to let the *naturalia* of the agreement determine such aspects.⁸³ If this inference is incorrect, then a party must seek rectification of the written agreement so that the omitted material term may be included.

The previous two sections have considered some basic distinctions necessary to understand the South African approach to formal requirements imposed for sales of land and suretyships. First, the legislation imposing formalities for these transactions has been interpreted as requiring that a document must embody the parties' agreement, rather than simply evidence the fact that an agreement had been concluded at some earlier stage. Secondly, the written agreement of suretyship or sale of land must record all the material terms of the parties' agreement. Material terms include both the *essentialia* of a suretyship or sale of land and additional terms specifically agreed upon and intended to regulate the parties' agreement. The focus now shifts away from these basic theoretical distinctions to some specific examples of the judicial interpretation of formal requirements.

⁸¹ Namely, payment in cash upon registration (*Herselman v Orpen* 1989 4 SA 1000 (SE) 1006B-C). See also *Exdev (Pty) Ltd v Yeoman Properties 1007 (Pty) Ltd* 2008 All SA 223 (SCA) para 7 ("[a]n option to purchase immovable property (and of course a simple contract for the sale of immovable property), is not invalid merely because it does not set out the method of and time for payment. In the absence of express agreement the law implies these terms.").

⁸² Eg *Hartland Implemente (Edms) Bpk v Enal Eiendomme BK* 2002 3 SA 653 (NC) 667D-E; *Chretien v Bell* 2011 1 SA 54 (SCA) para 11. In both cases, however, the parties had recorded these terms in their written agreements (*Hartland Implemente (Edms) Bpk v Enal Eiendomme BK* 2002 3 SA 653 (NC) 660H; *Chretien v Bell* 2011 1 SA 54 (SCA) paras 4, 11), which means that the broad statement by each court was in fact borne out by the facts of that case.

⁸³ The same point is made in G F Lubbe "Law of Purchase and Sale" 2002 ASSAL 301 305; R Sharrock "The General Principles of the Law of Contract" 2010 ASSAL 543 561; Kerr *Sale and Lease* 84 n 56.

3 3 Terms which must appear in an agreement subject to formalities

3 3 1 Introduction

The following discussion considers South African case law on what must appear in a written suretyship and sale of land. It bears repeating that it does not purport to be exhaustive. A few select cases have been chosen to illustrate the South African approach. Furthermore, the focus is on case law relating to the *essentialia* of these two transactions. For suretyships, this entails that the identity of the creditor, surety and principal debtor, as well as the nature and amount of the principal debt, should be in writing.⁸⁴ A formally valid sale of land requires the written identification of the seller and purchaser, a description of the land sold and an indication of the purchase price.⁸⁵ Although the discussion will be limited to these aspects, the general principles which become evident below are equally applicable to non-essential, albeit material, terms (as indicated in the previous section)⁸⁶ and to alienations of land in the form of exchange or donation.⁸⁷ Finally, unless it becomes necessary to distinguish specific principles applicable only to the sale of land or suretyships, the following discussion applies to both transactions equally.

3 3 2 The identity of the parties

The discussion below is organised according to certain general principles which guide a court in determining whether an agreement is formally valid. These principles are derived from case law and are intended to serve as a means to group together certain typical fact patterns. They are not, however, unique to the topic of statutory formalities.⁸⁸ Furthermore, it is entirely possible that more than one principle will guide a court in the determination of formal validity; the fact that they are discussed separately does not mean that they are mutually exclusive.

⁸⁴ *Sapirstein v Anglo African Shipping Co (SA) Ltd* 1978 4 SA 1 (A) 12B-D.

⁸⁵ *Johnston v Leal* 1980 3 SA 927 (A) 937H.

⁸⁶ See 3 2 2: where parties have agreed upon a specific mode of payment of the purchase price, this material term must be objectively ascertainable.

⁸⁷ See eg *Hoeksma v Hoeksma* 1990 2 SA 393 (A) 897C: in a contract of exchange, the performances must be identified or identifiable. See also Van Rensburg & Treisman *Guide to the Alienation of Land Act* 49-50; P J Aronstam *The Alienation of Land* (1985) 36

⁸⁸ Eg the fact that the terms of a contract must be objectively ascertainable is a general requirement for the validity of all contracts and not only those subject to formalities.

3 3 2 1 *The principle of objective ascertainability*

While the simplest means of identification of the parties to an agreement would entail the recordal of their names, the facts surrounding the conclusion of the agreement sometimes necessitate a less specific form of identification. For example, an agreement is not void where it identifies the principal debtor(s)⁸⁹ or purchaser(s)⁹⁰ as “A and/or B”. Such a clause should be interpreted as making provision for the future possibility that either A, or B, or both A and B will be principal debtors or purchasers.⁹¹ In spite of the criticism which has been lodged against the phrase “and/or”,⁹² courts have held that this type of identification is not vague and extrinsic evidence is admissible to identify the actual party (or parties) on the facts.⁹³ Similarly, an agreement which states that a surety is bound to “X Ltd and each of its subsidiaries” has been held to contain a sufficient description of the creditors.⁹⁴ When a suretyship agreement identifies the creditor as a member of a class, extrinsic evidence is admissible to identify which of that class is in fact the creditor.⁹⁵

These examples illustrate the general principle that South African courts do not require meticulous accuracy in the recordal of the identity of the parties.⁹⁶ As stated in the previous chapter,⁹⁷ it has been recognised in cases dealing with the question, that a judicial insistence on strict compliance with formal requirements would “merely be an encouragement to [a dishonest party] to escape from his bargain on a technical defect in

⁸⁹ *Du Toit v Barclays Nasionale Bank Bpk* 1985 1 SA 563 (A).

⁹⁰ *Berman v Teiman* 1975 1 SA 756 (W).

⁹¹ *Berman v Teiman* 1975 1 SA 756 (W) 757F-H; *Du Toit v Barclays Nasionale Bank Bpk* 1985 1 SA 563 (A) 570G-H.

⁹² Eg in *Ex Parte McDuling* 1944 OPD 187 189, Van den Heever R described the phrase as “daardie Engelse ongerymdheid”, stating that it was “‘n greep om helder begrippe te ontwyk, nie om hulle uit te druk nie; mens kan net sê: ‘trousers is and/or are’”.

⁹³ *Du Toit v Barclays Nasionale Bank Bpk* 1985 1 SA 563 (A) 569H-I. The relationship between extrinsic evidence, the parol evidence rule and statutory formalities is discussed in ch 4.

⁹⁴ *African Lumber Co (Pvt) v Katz* 1978 4 SA 432 (C) 435A-G.

⁹⁵ A more complex illustration of the principle that a party may be identified as a member of a class is found in *Sapirstein v Anglo African Shipping Co (SA) Ltd* 1978 4 SA 1 (A). See ch 4 (4 3 1).

⁹⁶ See eg *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 1 SA 983 (A) 989; *Credit Guarantee Insurance Corporation of SA Ltd v Schreiber* 1987 3 SA 523 (W) 525C.

⁹⁷ Ch 2 (2 4 4).

the [recordal], even in cases where there was no dispute at all between the parties”.⁹⁸ While this does not mean that a court will make a contract for the parties when it is unable to ascertain their intention with a reasonable degree of certainty,⁹⁹ it does mean that

“inelegance, clumsy draftsmanship or loose use of language in a commercial document purporting to be a contract, will not impair its validity as long as one can find therein, with reasonable certainty, the terms necessary to constitute a valid contract.”¹⁰⁰

This general principle - that the terms of the agreement are only required to be objectively ascertainable - also explains why it is sufficient to describe the seller in a sale of land as “the owner”,¹⁰¹ which may mean the registered owner or the person entitled to dispose of the property whose name has not yet been registered.¹⁰² This form of identification is objectively ascertainable, because regard may be had to the Deeds Registry or some other objective evidence, to determine the exact identity of “the owner”. By contrast, a suretyship will be formally invalid if the principal debtor, for example, is identified simply as “the debtor” in the document.¹⁰³ Identification of the exact principal debtor which the parties had in mind would require evidence of their negotiations or consensus. This, in turn, would create the possibility of fraud and perjured claims and thus defeat the purpose of formal requirements.¹⁰⁴

3 3 2 2 *The principle of a reasonable construction in favour of formal validity*

A different principle is reflected in cases where the parties are adequately identified, albeit mistakenly, by the same name. An illustration of the curial approach to this type of problem is found in *Republican Press (Pty) Ltd v Martin Murray Associates CC*¹⁰⁵

⁹⁸ *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 1 SA 983 (A) 989.

⁹⁹ *Clements v Simpson* 1971 3 SA 1 (A) 7D-E.

¹⁰⁰ *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 1 SA 669 (W) 670G-H.

¹⁰¹ *Hill v Faiga* 1964 4 SA 694 (W) 596G-H; *Roodt v G E Symons, Styane, Thornton & Co (Pty) Ltd* 1977 2 SA 458 (T) 463G-H; *Day v Charlet Properties (Pty) Ltd* 1986 2 SA 391 (C) 395A-D.

¹⁰² *Roodt v G E Symons, Styane, Thornton & Co (Pty) Ltd* 1977 2 SA 458 (T) 464F-G; *Day v Charlet Properties (Pty) Ltd* 1986 2 SA 391 (C) 395A-B.

¹⁰³ *Wallace v 1662 G & D Property Investments CC* 2008 1 SA 300 (W) paras 19-22.

¹⁰⁴ Para 20.

¹⁰⁵ 1996 2 SA 246 (N).

(“*Republican Press*”) and *Intercontinental Exports (Pty) Ltd v Fowles*¹⁰⁶ (“*Intercontinental Exports*”). Both cases dealt with suretyships. In the former, the document identified both the creditor and the principal debtor as “*Republican Press (Pty) Ltd*”.¹⁰⁷ In the latter, the principal debtor was identified as “*Mr Frank Fowles*” while the surety was described as “*Frank Turner Fowles*”.¹⁰⁸ In these types of cases, the agreement is capable of at least two possible interpretations.¹⁰⁹ The first is that the parties are one and the same person. On such an interpretation, the suretyship would be invalid due to non-compliance with statutory formalities. The second possible interpretation is that the parties are in fact different but with identical or similar names; the consequence of this would be that the agreement is found to be formally valid. Which interpretation is adopted by the court depends on whether the parties are natural or juristic persons.

Thus, in *Republican Press*, the court concluded that since there cannot be more than one company with the same registered name, it could not reasonably interpret the names as belonging to two different persons and therefore held that the suretyship was invalid.¹¹⁰ By contrast, it was decided in *Intercontinental Exports* that although the names reflected as principal debtor and surety were similar, they were not identical and, *ex facie* the document, did not necessarily refer to the same person. Even if the two names were to be identical, it did not follow as a matter of course that they referred to the same person.¹¹¹ This suretyship was therefore capable of being construed *ex facie* the document as reflecting a creditor, principal debtor and surety and was held to comply with the statutory formalities.

The distinction drawn by these two cases has been criticised on the basis that

¹⁰⁶ 1999 2 All SA 304 (A).

¹⁰⁷ *Republican Press (Pty) Ltd v Martin Murray Associates CC* 1996 2 SA 246 (N) 248I.

¹⁰⁸ *Intercontinental Exports (Pty) Ltd v Fowles* 1999 2 All SA 304 (A) para 15.

¹⁰⁹ Para 18.

¹¹⁰ *Republican Press (Pty) Ltd v Martin Murray Associates CC* 1996 2 SA 246 (N) 251G-I. The same reasoning was adopted in *Nuform Formwork and Scaffolding (Pty) Ltd v Natscaff CC* 2002 4 All SA 575 (D) in which a close corporation was identified as both surety and principal debtor.

¹¹¹ *Intercontinental Exports (Pty) Ltd v Fowles* 1999 2 All SA 304 (A) para 17. See also *Inventive Labour Structuring (Pty) Ltd v Corfe* 2006 3 SA 107 (SCA) paras 10-11.

“[c]hance may determine whether the transcription error in question, in addition to giving the same name to two parties, introduces a slight difference into the name thereby allowing the principle of *Intercontinental Exports* to operate or whether the name is identical so the case falls within *Republican Press (Pty) Ltd*”.¹¹²

Although the distinction does appear arbitrary at first glance, this criticism loses sight of one simple fact: companies *may not* have the same name while natural persons can and often do. It carries greater weight however, when one considers that the content of the transcription error will determine whether a party is entitled to claim rectification of the written agreement. This is considered in greater detail in a subsequent chapter;¹¹³ for current purposes, these cases are mentioned because they illustrate that a court will favour an interpretation which leads to formal validity where a document is reasonably capable of such a construction.

3 3 2 3 *The principle that the document as a whole determines formal validity*

When determining whether parties have been adequately identified, a court will consider the document as a whole before concluding that it is formally valid or invalid.¹¹⁴ This principle finds application in a number of factual circumstances. For example, when a suretyship is contained within the contract creating the principal debt, the failure to identify the creditor in the former does not render it invalid, because it is assumed that the creditor is the same party as that identified in the principal agreement.¹¹⁵ Similarly, an agreement which identifies the “purchaser” or “seller” in the body of the document as a juristic person, but which contains the unqualified signature of a natural person as “purchaser” or “seller”, will also be valid. In such a case, a court will interpret the words “seller” or “purchaser” throughout the recordal as meaning the juristic person so identified in the body of the document.¹¹⁶ Since somebody must always sign on behalf of a company, the only

¹¹² C F Forsyth & J T Pretorius *Caney's The Law of Suretyship* 5 ed (2002) 71. This opinion is expressed again in the sixth edition (76 n 73).

¹¹³ See ch 5.

¹¹⁴ *Intercontinental Exports (Pty) Ltd v Fowles* 1999 2 All SA 304 (A) para 15.

¹¹⁵ *Warricker and Another NNO v Senekal* 2009 1 SA 509 (W) para 12.

¹¹⁶ *Hamdulay v Smith* NO 1984 3 SA 308 (C) 312B-C. See also *Major v Business Corners (Pty) Ltd* 1940 WLD 84; *Meter Motors (Pty) Ltd v Cohen* 1966 2 SA 735 (T); *Hutchinson v Hylton Holdings* 1993 2 SA 405 (T); *S A I Investments v Van der Schyff* NO 1999 3 SA 340 (N).

reasonable construction of the document, read as a whole, is that the signatory intended to sign as a representative of the company.¹¹⁷

The same principle determines whether a blank space in the document where the name of one of the parties should have appeared is fatal to the agreement's validity. Provided that that party's name appears elsewhere in the recordal, the agreement will comply with formalities;¹¹⁸ the opposite conclusion will be reached if reading the document as a whole does not adequately identify a party. This is illustrated in *Mineworkers' Union v Cooks*¹¹⁹ ("*Mineworkers*").

There, the unqualified signature of the seller belonged to "J F B Botha". In the body of the document, the seller's identity was left blank, followed by the description

"duly authorised hereto by virtue of a power of authority and acting in his capacity as general secretary of the Mineworkers' Union. (Hereinafter referred to as the seller)".¹²⁰

According to Dowling J, it was not possible to use the identity of the signatory to complete the blank space:

"I do not think ... that as a matter of construction I can say that because reference to a person unnamed is made as agent for the applicant which is described as 'seller' that thereafter any person signing as 'seller' at the foot of the agreement must be taken to be acting in a capacity and on behalf of the seller and not in *proprio persona*."¹²¹

Reading the document as a whole would not have provided clarity as to the identity of the seller: if the signatory's name had been inserted in the blank space, it would still not have indicated whether the seller was Botha or the Mineworkers' Union.¹²² Extrinsic evidence of

¹¹⁷ *Hamdulay v Smith* NO 1984 3 SA 308 (C) 312B-C.

¹¹⁸ *Intercontinental Exports (Pty) Ltd v Fowles* 1999 2 All SA 304 (A) para 15.

¹¹⁹ 1959 1 SA 709 (W).

¹²⁰ 711A.

¹²¹ 712C-D.

¹²² See also *Van der Merwe v Kenkes (Edms) Bpk* 1983 3 SA 909 (T) 915H-916A:

"Indien Botha se naam in die oopgelate spasie ingevul was, is dit ewe moontlik dat Botha nog steeds in eie naam die verkoper kan wees. Dit is moontlik dat die woorde '([H]ereinafter referred to as the seller)' steeds sou terugverwys na die persoon wie se naam in die oopgelate spasie ingevul was en nie na die Mynwerkers-Unie nie."

the parties' negotiations or consensus would have been necessary to resolve the uncertainty which, as we shall see in the next chapter, is traditionally excluded in determining whether an agreement is formally valid.

There is one last example of the alleged failure to identify a party to the agreement which merits discussion. These are instances where someone is identified as one of the parties to the agreement and signs the agreement ostensibly in his personal capacity, but is subsequently alleged to have acted on behalf of an unnamed principal or in the interests of an undisclosed principal. A representative acts on behalf of an unnamed principal when he concludes an agreement with a third party, clearly in a representative capacity but without disclosing the identity of his principal. This is a true instance of representation, because the rights and duties created by the contract enure to the principal and not to the representative.¹²³ By contrast, an intermediary who acts in the interests of an undisclosed principal concludes a contract in his own name – he is both a contracting party and the bearer of rights and obligations arising from that contract.¹²⁴ The doctrine of the

A similar observation was made in *Muller v Pienaar* 1968 3 SA 195 (A) 202F-G; *S A I Investments v Van der Schyff* NO 1999 3 SA 346 (N) 348D-E.

¹²³ Van der Merwe et al *Contract* 221 n 62; J C De Wet & A H van Wyk *Die Suid-Afrikaanse Kontraktereg & Handelsreg* 15 ed (1992) 100-101.

¹²⁴ The notion that the intermediary acts in his own name is criticised by A J Kerr *The Law of Agency* 4 ed (2006) 210 n 13:

“This hypothesis ought not to be adopted ... If the agent is not acting as an agent [ie because he is acting in his own name] he has no principal, disclosed or undisclosed”.

Contrary to Kerr's opinion, it is suggested there is nothing inherently wrong in stating that the intermediary (or “agent” as Kerr would have it) acts in his own name, provided it is understood to mean that the actual agreement is concluded between the intermediary and the third party (which is the sense in which the phrase was used in *Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Koöperasie Bpk* 1972 1 SA 761 (A) 766H-767A read with 769B and 770D-E) – a point which Kerr also appears to doubt (*Agency* 212-213). It falls outside the scope of this dissertation to discuss the operation of the doctrine of the undisclosed principal in detail, although it should be pointed out that Kerr's argument that the contract is in fact concluded between the third party and the principal (*Agency* 213) does not appear to find support in *Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Koöperasie Bpk* 1972 1 SA 761 (A) 770D-E. Furthermore, Lord Anderson's statement in *Craig v Blackater* 1923 SC 472 (“*Craig*”), to the effect that “if A contracts for an undisclosed principal, A may sue and is liable to be sued as a principal, the third party having no knowledge that he is anything but a principal”, does not support Kerr's argument that the intermediary may be bound to a contract to which he did not intend to be a contracting party on the basis of estoppel (*Agency* 213 n 32). Lord Anderson's remark on the knowledge of the third party relates to whether that party has an election to sue

undisclosed principal allows the principal to sue the other contracting party once the former discloses his identity. Similarly, once the other contracting party becomes aware of the existence of the principal, he may choose to sue him rather than the intermediary.¹²⁵

A court is required to answer two questions when it is alleged that an ostensible party to an agreement subject to formalities has in fact acted on behalf of an unnamed principal or in the interests of an undisclosed principal. First, to what extent is extrinsic evidence permissible to show that there is another party entitled to sue on the written agreement despite the fact that he remains unidentified in the document itself? Secondly, does the failure to identify the principal render the agreement formally invalid?

As will become apparent in the following chapter, the admissibility of extrinsic evidence is governed by the parol evidence rule and the rules relating to statutory formalities. Usually, both prevent the admission of extrinsic evidence if it varies, contradicts or supplements the written agreement.¹²⁶ However, the type of fact pattern described above is one of those instances where such rules result in opposing conclusions, at least insofar as it relates to evidence tendered to show that an apparent party to the agreement was in fact acting in the interests of an undisclosed principal.¹²⁷ The parol evidence rule does not prohibit extrinsic evidence showing that there is an undisclosed principal: the evidence is not intended to discharge the intermediary from liability (and therefore it does not vary what appears *ex facie* the document), but is intended to show that there is an additional party entitled to sue on the written agreement.¹²⁸

the undisclosed principal or the intermediary, a choice which arises only once the third party becomes aware of the principal (see Lord Anderson's statement made immediately after the one quoted above).

¹²⁵ Van der Merwe et al *Contract* 263; De Wet & Van Wyk *Kontraktereg* 1 126.

¹²⁶ See eg *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 47 (parol evidence rule), *Industrial Development Corporation of SA (Pty) Ltd v Silver* 2003 1 SA 365 (SCA) para 9 (formal requirements) and the discussion in ch 4 (4 2).

¹²⁷ The rules relating to the admission of extrinsic evidence to show that an agent has acted on behalf of an unnamed principal are discussed further below in the main text.

¹²⁸ *Cook v Aldred* 1909 TS 150 152; *Muller v Pienaar* 1968 3 SA 195 (A) 204E-G; Christie & Bradfield *Contract* 210; D J Joubert *Die Suid-Afrikaanse Verteenwoordigingsreg* (1979) 35, 57-58.

However, it has been held that statutory formalities will exclude extrinsic evidence of the existence of an undisclosed principal. In *Grossman v Baruch*¹²⁹ (“*Grossman*”) a written offer to purchase was directed to “[t]he Seller” and signed by one Wiggill (as “[t]he Seller”), without any qualification to indicate that he was acting in a representative capacity.¹³⁰ The plaintiff alleged that the signatory was his agent and that he was in fact the true seller of the property, although he remained unidentified in the document. The point raised on exception by the defendants was that

“as there [was] nothing to indicate that Wiggill accepted the offer in any representative capacity but that indeed he acted as the agent of an undisclosed principal, the latter, ie the plaintiff, [could] derive no benefit from the contract entered into by his agent. It [was] argued that ... because of the [formal] provisions [relating to sales of land], no evidence [could] be led to identify the true seller, who, in this case, [was] said to be the plaintiff.”¹³¹

Coetzee J agreed with the defendants’ contention. He referred, *inter alia*, to *Muller v Pienaar*¹³² in which the court made the *obiter* remark that while the parol evidence rule may not preclude the admission of extrinsic evidence relating to an undisclosed principal, formal requirements may have such an exclusionary effect.¹³³ Coetzee J therefore concluded that

“as a result of the statutory requirements the identity of the parties is something that must appear *ex facie* the writing. In the present case this is of course not so and the identity of the parties to the contract relied upon by the plaintiff certainly does not appear from the writing. Consequently, the point taken by the defendants is well taken”.¹³⁴

The exact import of Coetzee J’s conclusion is unclear. The defendants argued that the failure to identify the plaintiff as the seller *ex facie* the document meant that he could not sue upon the written agreement. The judge agreed, for the reason quoted above. This is not the same as arguing that the agreement is void as against the ostensible seller, namely Wiggill, and yet Coetzee J creates this impression by citing a statement made in

¹²⁹ 1978 4 SA 340 (W).

¹³⁰ 341A-C.

¹³¹ 341D-F.

¹³² 1968 3 SA 195 (A) 204G-H.

¹³³ *Grossman v Baruch* 1978 4 SA 340 (W) 342G.

¹³⁴ 343A.

the *Mineworkers* case discussed above:¹³⁵ if extrinsic evidence is necessary to establish the identity of one of the parties, the agreement will be invalid.¹³⁶

It is argued that a distinction should be drawn between the document which served before the court in *Mineworkers* and that before Coetzee J. *Ex facie* the document in the former case, it was unclear whether the seller was “J F B Botha” or the Mineworkers’ Union – inadmissible extrinsic evidence of the parties’ consensus or negotiations would have been necessary to obtain clarity on this point. As a result the agreement was invalid. By contrast, the document before Coetzee J did indeed identify a seller, as well as contain all the other material terms. *Ex facie* the document, the agreement appeared to comply with formal requirements. The confusion is created by the fact that the judge states that extrinsic evidence may not be used to introduce an additional party to an agreement subject to formalities when that party is unidentified in the document, but he simultaneously seems to suggest that this evidence may well be used to indicate that the agreement is formally invalid for failure to identify “the true seller”. However, such an implication overlooks the fact that an intermediary who acts in the interests of an undisclosed principal intends to conclude the contract in his own name and to be the bearer of rights and duties created by that contract. For all intents and purposes, the intermediary is the “true” seller at the time of conclusion of the contract, and the agreement should not be invalid as against that intermediary.

Whether or not Coetzee J actually concluded that the deed of sale was formally invalid, *Grossman* has been interpreted as authority for such a conclusion. In *Mills NO v Hoosen*¹³⁷ (“*Mills NO*”) an offer to purchase was addressed to “Andre Kitshoff” as the “[p]rovisional [t]rustee/[l]iquidator .../... [e]xecutor” of a named deceased estate.¹³⁸ Kitshoff signed in his personal capacity in spite of the fact that he had been appointed in writing to act as agent on behalf of the appellant.¹³⁹ Counsel for respondent argued that

¹³⁵ *Mineworkers’ Union v Cooks* 1959 1 SA 709 (W) 712B-C.

¹³⁶ *Grossman v Baruch* 1978 4 SA 340 (W) 341G. P M Nienaber “Oor die Beskrywing van Partye in ‘n Koopkontrak van Grond” in Q de Wet (gen ed) *Aangebied aan Professor Daniel Pont op sy Vyf-En-Sewentigste Verjaarsdag* (1970) 250 258-259 also concludes that the agreement will be formally invalid in this type of case.

¹³⁷ 2010 2 SA 316 (W).

¹³⁸ Para 4.

¹³⁹ Para 3.

the agreement was formally valid because it identified the true seller *ex facie* the document, namely the deceased estate.¹⁴⁰ Since a deceased estate has no legal personality however, *dominium* in the assets vests in the executor of the estate – in other words, the “true” seller is not the deceased estate, but the executor of that estate.¹⁴¹ This led the court to conclude that

“[i]f evidence *dehors* the agreement is necessary to establish the identity of the seller, the agreement is invalid. [Formalities do] not permit an undisclosed or unidentified principal to be a party to the sale. Thus when an agreement is signed by an agent, with nothing to indicate that he was signing as agent of the seller, the agreement of sale would be invalid. In *Grossman* ... an agent accepted an offer without indicating that he was signing as agent of the seller. As the identity of the seller did not appear *ex facie* the deed, and evidence to identify the true seller was inadmissible, the deed of sale was held to be invalid and could not sustain a cause of action.”¹⁴²

The court’s conclusion is problematic, because it conflates the legal phenomena of an undisclosed and an unnamed principal. As discussed above, an intermediary who acts in the interests of an undisclosed principal concludes the contract in his own name. He is the true party to the contract and his intention is to assume personal liability in terms of that contract. For this reason, it is suggested that an agreement which identifies the intermediary as seller or purchaser does comply with formal requirements, and is not invalid as stated in *Mills NO* and implied in *Grossman*.¹⁴³

¹⁴⁰ Para 10.

¹⁴¹ Para 12.

¹⁴² Para 13 (footnotes omitted).

¹⁴³ *Mills NO v Hoosen* 2010 2 SA 316 (W) served as the basis for the recent decision in *Booyesen v Booyesen* 2012 2 SA 38 (GSJ) (“*Booyesen*”). There, the surviving spouse of a couple married in community of property sold immovable property forming part of the joint estate without the consent of the executor and before the estate was finalised. The respondents contended that *Mills NO v Hoosen* 2010 2 SA 316 (W) was inapplicable, because the seller in *Booyesen* was acting in his personal, rather than a representative, capacity (para 14). According to the court this argument was incorrect, on the basis that *Mills NO v Hoosen* 2010 2 SA 316 (W) makes it clear that since a deceased estate has no legal personality of its own, the executor of the estate is the true seller and it is his identity which must appear in the document (para 14). It has been suggested, correctly it is submitted, that the respondents’ contention was indeed sound and that the court should have concluded that the sale of land was formally valid, because the seller was acting in his personal capacity (R Sharrock “Contract” (January-March 2012) *JQR* para 2.4.1 <<http://ipproducts.jutalaw.co.za.ez.sun.ac.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu> > (accessed 08-11-2012).) The real reason why the agreement was invalid in that case was

By contrast, an agent who acts on behalf of an unnamed principal does not intend to assume personal liability. It should also be pointed out that the other contracting party is aware of the fact that he will be concluding an agreement, not with the agent, but with an unidentified principal.¹⁴⁴ However, any extrinsic evidence tendered to show that the agent is not personally liable would contradict the appearance of personal liability *ex facie* the written agreement.¹⁴⁵ Furthermore, it is a general rule that formal validity is determined from the terms of the document itself – extrinsic evidence which contradicts the appearance of formal validity *ex facie* the document is inadmissible.¹⁴⁶ As stated in *Swanepoel v Nameng*:¹⁴⁷

“[T]he determination of the question whether ... formalities ... have been complied with does not involve an enquiry into the intention of the parties”.¹⁴⁸

Therefore, both the parol evidence rule and statutory formalities would seem to prevent a court from taking into account that despite what appears on the face of the document, neither the agent nor the other contracting party intended that the former would be

because the seller lacked the necessary capacity to conclude the contract (Sharrock (January-March 2012) *JQR* para 2.4.1). Therefore, this case is not discussed in the main text because it is not a true example of a party acting on behalf an unnamed principal or in the interests of an undisclosed principal.

¹⁴⁴ See B Kuschke & D Hutchison “Parties to Contracts” in D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 2 ed (2012) 219 225-226 (footnote omitted):

“Where [an agent] informs [the other contracting party] that he or she acts on behalf of [a principal], whose identity he or she refuses to disclose, and [the other contracting party] is prepared to contract on that basis, the ensuing contract will be solely between [that other contracting party] and the unidentified principal.”

¹⁴⁵ *Kruger v Rheeder* 1972 2 SA 391 (O) 394D-E; Joubert *Verteenwoordigingsreg* 35, 57-58.

¹⁴⁶ *Van Oudtshoorn v Investec Bank Ltd* (558/10) [2011] ZASCA 205 (25-11-2011) para 37; *Intercontinental Exports (Pty) Ltd v Fowles* 1999 2 All SA 304 (A) paras 13, 20. See also ch 4 (4 3 4). It will be recalled that the type of factual scenario discussed in the main text is one where the document identifies the agent as a party to the contract and contains his signature without any qualification to indicate that he is signing in a representative capacity. It is a different matter if it is evident *ex facie* the document that a party is acting on behalf of an unnamed principal – in such a case, the agreement will be formally invalid because it is evident on the face of the document that one of the parties to the agreement remains unidentified. This is illustrated in *JPS Nominees (Pty) Ltd v Kruger* 1976 1 SA 89 (W), in which a suretyship was held to be invalid because it described the creditor(s) as “J. Perkel, Silverman & Co., acting for and on behalf of various nominees”.

¹⁴⁷ 2010 3 SA 124 (SCA).

¹⁴⁸ Para 16.

personally liable. At the very least, this means that the unnamed principal would not be able to sue or be sued in terms of the agreement. Although this is not the prevailing opinion,¹⁴⁹ it is argued that the exclusion of extrinsic evidence in this context means that the agreement is formally valid and could, in theory, be enforced against the agent in his personal capacity. However, it is suggested that this is not an insurmountable problem. It has always been an exception to both the parol evidence rule and formal requirements that evidence may be tendered to show that despite the appearance of consensus *ex facie* the document, there was in reality no such consensus and that the agreement is void for that reason.¹⁵⁰ It is suggested that this exception would be applicable here: neither party to the contract agreed that the agent would be personally liable. There is no consensus on what appears in the written agreement and it is void for that reason, and not because it is formally defective.¹⁵¹

While an unnamed principal would not be able to enforce an agreement subject to formalities, the conclusion in *Grossman* that an undisclosed principal is precluded from doing so merits further consideration, because case law on formalities in suretyships contradicts this conclusion.

First, there is the *obiter* remark in *Durity Alpha (Pty) Ltd v Vagg*¹⁵² (“*Durity*”) that formal requirements do not preclude the possibility that an undisclosed principal, as creditor, may sue the surety once the former discloses his identity. The court does not explain why it

¹⁴⁹ In addition to *Mills NO v Hoosen* 2010 2 SA 316 (W), see also eg *Andre Robert Construction CC v Port Elizabeth Municipality* 1998 JDR 0039 (SE) (14-11-1997) 12-13; J Pretorius “Surety Issues: A Survey of Recent Cases” (2006) 14 *JBL* 164 169 for the statement that an agreement concluded on behalf of an unnamed principal, but which fails to identify that principal in the document, is formally invalid. Pretorius relies on N Grové *Die Formaliteitsvereiste by Borgstelling* LLM thesis University of Pretoria (1984) 170-171 for his conclusion, but it is not entirely clear whether the latter author was of the opinion that the agreement would be formally invalid in this situation, or simply that the unnamed principal would not be entitled to sue and be sued in terms of the agreement.

¹⁵⁰ See ch 4 (4 3 4).

¹⁵¹ It is suggested that rectification of the contract (see ch 5) would not be possible in this situation. Although the parties’ common intention is that the agent would not be personally liable, their common intention is also that the principal would remain unidentified. To rectify the contract by inserting the identity of the principal would be contrary to that intention and would, in effect, amount to the judicial variation of the parties’ agreement.

¹⁵² 1991 2 SA 840 (A) 842F-H.

comes to this conclusion or how it may be reconciled with the general rule that the identities of the parties should appear in the document.

Secondly, both the agreement creating the principal debt and the suretyship in *Sasfin Bank Ltd v Soho Unit 14 CC t/a Aventura Eiland*¹⁵³ (“*Sasfin*”) specifically made provision for the possibility that the original creditor’s rights might be ceded after conclusion of the agreement.¹⁵⁴ This meant that the possibility that an undisclosed principal might sue on the suretyship was already foreshadowed in the suretyship agreement itself: once the principal made himself known, he became entitled to the rights of the intermediary (the original creditor) by virtue of an *ex lege* cession.¹⁵⁵ The court continued:

“If [the undisclosed principal] is in fact to be regarded as the cessionary of the rights originally acquired by [the intermediary], as I perceive the position to be, the argument [that the suretyship is formally invalid because it fails to identify the plaintiff as creditor] has, in fact, already been considered and was rejected by Muller JA in *Pizani and Another v First Consolidated Holdings [(Pty) Ltd 1979 1 SA 69 (A)]* at 79E - G:

‘The [argument] ... was that, since the name of the creditor is an essential term of a suretyship agreement and must therefore be contained in writing (*Foullamel (Pty) Ltd v Maddison 1977 (1) SA 333 (A)* at 344-5), and since by cession of the principal debt a new creditor (not the one named in the deed of suretyship) was created, the sureties were not bound because they had not agreed in writing to the substitution of a new creditor and hence the deed fell foul of s 6 of [the General Law Amendment Act] ... Here, as I have pointed out, the sureties bound themselves in writing also to the successors or assignees of the creditor. The identity of such creditor’s cessionary may validly be established by extrinsic evidence of the cession.’”¹⁵⁶

Therefore, when a suretyship provides for the possibility that the creditor’s rights may be ceded to someone else, this provision is broad enough to include both a consensual and *ex lege* transfer of rights. Any extrinsic evidence necessary to identify the actual creditor would not relate to the consensus or negotiations of the (original) parties to the agreement,

¹⁵³ 2006 4 SA 513 (T).

¹⁵⁴ Paras 10, 31.

¹⁵⁵ Para 34.

¹⁵⁶ Para 36.

but simply amount to the application of the terms of the agreement to the facts of the case.¹⁵⁷

Neither *Durity* nor *Sasfin* are particularly useful for the purpose of concluding, in general, that an undisclosed principal may sue or be sued in terms of an agreement subject to formalities. However, it is submitted that the argument that formalities preclude this because the identities of the parties to the agreement must appear in writing is unconvincing. For example, the “huur gaat voor koop” rule has been interpreted to allow a purchaser to sue a surety for the lessee’s obligations despite the fact that that purchaser has not been identified in the suretyship as creditor,¹⁵⁸ and it appears that a cessionary could be allowed to sue a surety in spite of the fact that the suretyship does not stipulate that the surety bound himself to the creditor or his “successors and assigns”.¹⁵⁹ The argument that an undisclosed principal may not sue or be sued in terms of an agreement subject to formalities because he remains unidentified in the agreement presupposes that he, and not the intermediary, is the real party to the agreement. As pointed out above, this amounts to a fundamental misunderstanding of the operation of the doctrine of the undisclosed principal. Like a cessionary or purchaser affected by the “huur gaat voor koop” rule, the undisclosed principal becomes a subsequent party to the agreement – he does not substitute the intermediary as the actual party to the agreement at the time of contract conclusion.

The real reason, it is argued, why the doctrine of the undisclosed principal will usually not be allowed to operate in the context of agreements subject to formalities is simply because the principal has not signed the document in his capacity as purchaser or seller in the context of a sale of land, or as surety to a suretyship agreement. This conclusion does not contradict what was said previously in relation to the application of “huur gaat voor koop”, the possibility that an unidentified cessionary may sue in terms of a suretyship or the

¹⁵⁷ *Sapirstein v Anglo African Shipping Co (SA) Ltd* 1978 4 SA 1 (A) 12B-D.

¹⁵⁸ *Mignoel Properties (Pty) Ltd v Kneebone* 1989 4 SA 1042 (A) 1051H-I.

¹⁵⁹ *SA Breweries Ltd v Van Zyl* 2006 1 SA 197 (SCA) paras 9-10. This case has been criticised on the basis that it suggests that a cession of future debts is not possible (contrary to what was held in *First National Bank of SA Ltd v Lynn NO* 1996 2 SA 339 (A) 360A-C) – see Forsyth & Pretorius *Suretyship* 48-49 n 94; 111 n 73; Pretorius 2006 *JBL* 164-165. For current purposes, the decision is relevant because there is no indication in the judgment that the fact that the suretyship omitted to mention the possibility of a cession rendered it formally invalid as against the cessionary.

Sasfin case, because a creditor is not required to sign a suretyship agreement.¹⁶⁰ By analogy, the operation of the doctrine would therefore appear to be limited to the case where the undisclosed principal, as creditor, seeks to sue the surety.¹⁶¹ Where the intermediary has acted as surety, or in the capacity of purchaser or seller, there is no room for the doctrine to operate.

3 3 2 4 Conclusion

This section has considered some of the general principles which a court will consider in determining whether a recordal contains a sufficient description of the parties to the contract. Some judgments appear to ignore these general principles, as well as the rule that formal validity must be determined from the document itself. For example, we have seen that courts have held that a sale of land apparently concluded by a party in his personal capacity, but who is in reality acting on behalf of an unnamed principal or in the interests of an undisclosed principal, is formally invalid for failing to identify the “true” party to the agreement. This is not a convincing argument.

In the case of an agent acting on behalf of an unnamed principal, the parties intend that the unnamed principal will be the true party to the agreement. Nevertheless, both the parol evidence rule and statutory formalities preclude evidence to this effect, because it varies what appears *ex facie* the contract. For this reason, the written agreement will be formally valid (because it identifies the agent as a party to the agreement), but the unnamed principal will not be able to sue or be sued in terms thereof. It has been argued however, that it may be possible to show that the written agreement is substantively invalid, because neither the agent nor the other contracting party intended that the former would incur personal liability.

In the case of an intermediary acting in the interests of an undisclosed principal, it is suggested that the agreement will be both formally and substantively valid as against *the*

¹⁶⁰ For this reason, it is suggested that even if a written option to purchase in favour of the lessee could be transferred to the purchaser in terms of the “huur gaat voor koop rule”, it would be unenforceable against that purchaser due to the absence of his signature as grantor of the option. See *Spearhead Property Holdings Ltd v E & D Motors (Pty) Ltd* 2010 2 SA 1 (SCA) para 38.

¹⁶¹ The same conclusion is drawn in Pretorius 2006 *JBL* 169.

intermediary: he intends to conclude the contract in his personal capacity and the document which records his identity identifies the true party to the agreement. It is therefore incorrect, it is submitted, to state that the agreement is formally invalid because it fails to identify the undisclosed principal. The real reason why the doctrine of the undisclosed principal is generally not applicable to agreements subject to formalities is simply because the principal has not signed the agreement. This means that the principal may not sue or be sued in terms of the agreement; the intermediary and the other contracting party however, may enforce the agreement against each other.

The requirement that an agreement subject to formalities must be signed is considered later in the chapter.¹⁶² In the following section, the extent to which the content of the parties' obligations must appear in writing is examined. Because the general principles which guide a court in the determination of formal validity have been illustrated in some detail above, the following section is fairly brief.

3 3 3 Identification of obligations

3 3 3 1 *Sale of land: description of the res vendita and the purchase price*

The approach to determining whether there is an adequate description of the land to be sold is summarised in *Clements v Simpson*.¹⁶³ The test is whether the contract describes the land with sufficient certainty so that it may be "identified on the ground" without recourse to the parties' negotiations or oral consensus.¹⁶⁴ There are two alternative means to comply with this test. First, the contract itself may provide a sufficient description. For example, it may describe the land by name if it is a farm,¹⁶⁵ by an address if it is residential property,¹⁶⁶ or by reference to a diagram or plan.¹⁶⁷ Provided the

¹⁶² See 3 4.

¹⁶³ 1971 3 SA 1 (A).

¹⁶⁴ 7F.

¹⁶⁵ See eg *Van Aardt v Galway* 2012 2 SA 312 (SCA) para 11.

¹⁶⁶ Eg *Herselman v Orpen* 1989 4 SA 1000 (SE) 1002E.

¹⁶⁷ Eg *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 1 SA 983 (A) 993; *Le Riche v Hamman* 1946 AD 648 651 (which described the land to be sold in terms of its physical location and the relevant transfer deed). Further examples of what constitutes a sufficient description are provided in *Van Rensburg & Treisman*

description renders the land objectively ascertainable, this will be sufficient for the purpose of formal validity.¹⁶⁸

Secondly, the contract may indicate that the parties intend that the buyer, the seller or a third party would choose the merx from a *genus* or class.¹⁶⁹ Thus, in *Exdev (Pty) Ltd v Pekudei Investments (Pty) Ltd*¹⁷⁰ the document provided, *inter alia*, that the first appellant would sell “an office unit of 260 m², together with eight parking bays, in the building [that it intends] to build at Twindale”.¹⁷¹ While the size of the unit and its general location was indicated, it was implicit in the description that the parties had agreed that the precise shape of the unit and its position in the building would be left to the choice of the seller.¹⁷² Until the choice was made, the merx was admittedly not identified. Nevertheless, this type of description satisfies the formal requirements. Although the choice of a specific piece of land falls within the discretion of one of the parties, the description of the land is objectively ascertainable, because

“the objection or reluctance of the other party cannot thereafter influence or obstruct the selection [because] the matter has been placed beyond the reach of consensus or cavil”.¹⁷³

In other words, while extrinsic evidence would be necessary to identify the specific piece of land chosen, this evidence would not be of the parties’ negotiations or consensus, but of the choice made by a party within the parameters agreed upon in the contract.¹⁷⁴

Guide to the Alienation of Land Act 46-48; Aronstam *Alienation of Land* 32-34; Christie & Bradfield *Contract* 124-126; Kerr *Sale and Lease* 91-92.

¹⁶⁸ This principle has recently been confirmed, in relation to the description of the land, in *Swanepoel v Nameng* 2010 3 SA 124 (SCA) para 13.

¹⁶⁹ See eg *Clements v Simpson* 1971 3 SA 1 (A) 6G-H; *JR 209 Investments (Pty) Ltd v Pine Villa Country Estate (Pty) Ltd*; *Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd* 2009 4 SA 302 (SCA) para 22.

¹⁷⁰ 2011 2 SA 282 (SCA).

¹⁷¹ Para 4.

¹⁷² Para 19.

¹⁷³ *Odendaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd* 1948 2 SA 656 (O) 665, confirmed in *Clements v Simpson* 1971 3 SA 1 (A) 8A.

¹⁷⁴ *Exdev (Pty) Ltd v Pekudei Investments (Pty) Ltd* 2011 2 SA 282 (SCA) para 19. There is an implied limitation of the power to choose the specific piece of land sold - the determination must be *bona fide* (see also *JR 209 Investments (Pty) Ltd v Pine Villa Country Estate (Pty) Ltd*; *Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd* 2009 4 SA 302 (SCA) para 22).

Once the parties have indicated the means of identifying the land sold in the written agreement, that choice is final. If it appears *ex facie* the document that the parties intended to identify the land solely by means of a description in the contract, then a deficient description will render the agreement void.¹⁷⁵ It is then not possible to argue, in the absence of an express or implied indication to the contrary in the document itself, that the intention was that some person would subsequently be entitled to choose the particular piece of land or property. Thus, in *Botha v Niddrie*¹⁷⁶ it was stated that

“[i]f the parties had intended to leave the northern boundary undefined and to give the seller the right to fix its position, they would undoubtedly have said so in the contract. They have not done so, and the mere fact that they have failed to fix the position of the northern boundary does not give rise to any inference that they intended it to be fixed by either party at his pleasure.”¹⁷⁷

The fact that the choice of identification of the land is final can have certain harsh consequences. For example, in *Magwaza v Heenan*,¹⁷⁸ the buyer appointed a land surveyor to draw up a survey diagram of the land to be sold. This diagram was at odds with the description of the land in the contract itself and the buyer sought rectification of the latter to conform to the former. However, because the description of the land sold was not sufficiently ascertainable, and because there was no indication in the contract that the parties had agreed to leave final determination to a third party, the court concluded that the agreement was formally invalid and therefore could not be rectified.¹⁷⁹

Regarding the purchaser's obligation to pay the purchase price, it would be sufficient if the document simply fixed the amount to be paid, or rendered it objectively ascertainable by

¹⁷⁵ However, the court is not confined to examining the clause in which the property itself is described but may consider the document as a whole in order to determine whether that description is completed elsewhere in the contract (see also 3 3 2 3 above). This approach was recently illustrated in *Vorster v Vorster* (CA366/2011) [2013] ZAECHC 1 (10/1/2013) paras 9-17.

¹⁷⁶ 1958 4 SA 446 (A).

¹⁷⁷ *Botha v Niddrie* 1958 4 SA 446 (A) 450H-451A. See also *Parsons v M C P Bekker Trust (Edms) Bpk* 1978 3 SA 101 (T) 104C-E.

¹⁷⁸ 1979 2 SA 1019 (A).

¹⁷⁹ 1024B-F. See also ch 5.

means of an external standard.¹⁸⁰ The latter means of fixing the price would include a reference in the written agreement to another document containing the price – provided certain requirements are met, the two documents may be read together and the agreement will be formally valid.¹⁸¹ Specific provisions determining when and where payment should occur are unnecessary, because these aspects are regulated by the *naturalia* of the contract.¹⁸² Disputes arise when parties include terms in the document which vary these *ex lege* provisions. As already pointed out,¹⁸³ these terms would constitute material terms and this leads to the related problem whether they have been recorded in the document with sufficient certainty to render extrinsic evidence of the parties' consensus or negotiations unnecessary. Since the admissibility of extrinsic evidence is discussed in detail in the next chapter, nothing further will be said here. Rather, the following section will consider those terms which determine the scope of a surety's obligations and which must, as a result, be reduced to writing.

3 3 3 2 *Suretyship: the nature and amount of the principal debt*

Because a suretyship creates an accessory obligation, a description of the nature and amount of the principal obligation which it secures is essential to the creation of the surety's liability and therefore to the validity of the agreement:

"It is a term of the contract in the true sense, in that it both defines and limits the surety's obligation under the contract and determines the extent or scope of the rights and obligations of the parties".¹⁸⁴

There is no requirement that the principal debt sought to be secured by the suretyship be limited to a contractual debt. A debt arising out of a delict may also be secured. In fact,

¹⁸⁰ *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 1 SA 669 (W) 670C-D; *Hartland Implemte (Edms) Bpk v Enal Eiendomme BK* 2002 3 SA 653 (NC) 667G-H.

¹⁸¹ Van der Merwe et al *Contract* 197; *Coronel v Kaufman* 1920 TPD 207 209. For an example where it was not possible to incorporate another document in order to supply the purchase price, see *Hartland Implemte (Edms) Bpk v Enal Eiendomme BK* 2002 3 SA 653 (NC) 670E-672B. Incorporation by reference is discussed in ch 4 (4 4).

¹⁸² These *naturalia*, however, vary according to whether the sale is one for cash or credit. See G Bradfield & K Lehmann *Principles of the Law of Sale & Lease* 3 ed (2013) 98-101.

¹⁸³ 3 2 2.

¹⁸⁴ *Fourelmel v Maddison* 1977 1 SA 333 (A) 345B.

the principal debt can be anything for which a person may become bound to another as a debtor.¹⁸⁵ This includes an agreement giving rise to a natural obligation – although the debt itself is unenforceable, it is capable of serving as the basis of a valid suretyship obligation, provided only that the debt itself is not the result of a prohibited transaction.¹⁸⁶

The general principles highlighted in the discussion on the identity of the parties are also applicable in determining whether the description of the principal debt is sufficient to comply with formal requirements. Thus, the nature and amount of the principal debt may be determined by reading the document as a whole, or by means of extrinsic evidence where the description is objectively ascertainable. For example, in *De Villiers v Nedfin Bank, a division of Nedcor Bank Ltd*,¹⁸⁷ the surety bound himself for payment of “all amounts of whatever nature and/or [for] performance of any obligation”.¹⁸⁸ The court held that the agreement was not invalid for failure to identify which of the debts owed by the principal debtor were secured by the surety – it was evident from the rest of the document that the surety was liable for all the obligations of a specific principal debtor which were owed to a particular creditor.¹⁸⁹ Similarly, in *Swiftair Freight v Singh*¹⁹⁰ the surety bound himself for obligations arising from “various transactions”.¹⁹¹ The court concluded that “various” meant transactions of whatsoever nature and however divergent, basing this interpretation on the dictionary meaning of the word “various”, as well on other terms of the

¹⁸⁵ It is therefore not limited to a money debt, but includes an obligation *ad factum praestandum*. Whether the creditor and surety intended that the latter would become liable to render the performance in terms of the principal debt is a matter of interpretation of the suretyship (J J Henning & K L Mould “Suretyship” in J A Faris & L T C Harms (eds) *LAWSA* 26 2 ed (2011) para 292; Forsyth & Pretorius *Suretyship* 107 n 56. However, if performance of the principal debt depends upon the personal skill or characteristics of the principal debtor, a court will conclude that the intention was that the surety would pay damages upon breach by the principal debtor, rather than deliver the performance itself (Henning & Mould “Suretyship” in *LAWSA* 26 para 26 n 6; Forsyth & Pretorius *Suretyship* 107 n 56; *Corrans v Transvaal Government and Coull’s Trustee* 1909 TS 605 614, 624, 628).

¹⁸⁶ Forsyth & Pretorius *Suretyship* 39-40; *BOE Bank Ltd v Bassage* 2006 5 SA 33 (SCA) para 9.

¹⁸⁷ 1997 2 SA 76 (E).

¹⁸⁸ 811.

¹⁸⁹ 811-82A.

¹⁹⁰ 1993 1 SA 454 (D).

¹⁹¹ 455A.

agreement which indicated that the creditor intended to cast the net as widely as possible.¹⁹²

These cases also illustrate that it is not essential that the principal obligation exists at the time that the suretyship agreement is entered into, nor is it necessary to describe it explicitly as being a future obligation.¹⁹³ If it is clear from the rest of the document that the obligation in question is yet to be incurred, that suffices.¹⁹⁴ Where the deed of suretyship does refer to a future obligation, whether expressly or by implication, extrinsic evidence is admissible to prove both that the principal debt has since arisen and what it amounts to.¹⁹⁵

To this point, the discussion has focused on which terms should appear in a written suretyship or sale of land. Formalities also require that the document be signed by one or both of the parties. What follows therefore addresses the questions of who may sign, what constitutes a signature and when a signature should be appended to the agreement.

3 4 Signature of the document

3 4 1 Who may sign?

In addition to requiring that the terms of the agreement must be in writing, both the Alienation of Land Act and the General Law Amendment Act require that the agreement be signed. Suretyships need only be signed by the surety, while sales of land require the

¹⁹² 456C-E.

¹⁹³ *Sapirstein v Anglo African Shipping Co (SA) Ltd* 1978 4 SA 1 (A) 11G; *Trust Bank of Africa Ltd v Frysch* 1977 3 SA 562 (A) 585G per Corbett JA (Jansen JA concurring). If the principal obligation is to come into existence in the future, the liability of the surety under the suretyship will only arise once the principal obligation has been contracted. *Trust Bank of Africa Ltd v Frysch* 1977 3 SA 562 (A) 584G-H.

¹⁹⁴ *Trust Bank v Frysch* 1977 3 SA 562 (A) 585G.

¹⁹⁵ *Sapirstein v Anglo African Shipping Co (SA) Ltd* 1978 4 SA 1 (A) 12A-D. It is possible however, that the amount of the principal debt is not proved by means of extrinsic evidence, but rather by means of a certificate of indebtedness. The suretyship may further provide that such a certificate will serve as conclusive proof of the debt. This is permissible provided that the author of the certificate is not the creditor, in which case the provision will be *contra bonos mores* – see *Ex Parte Minister of Justice: In Re Nedbank Ltd v Abstein Distributors (Pty) Ltd and Donnelly v Barclays National Bank Ltd* 1995 3 SA 1 (A) 22C-D (but see *Society of Lloyd's v Rohman* 2006 4 SA 23 (C) para 125, in which it was suggested that the notion that a conclusive proof certificate of which the creditor is the author is always contrary to public policy should be reconsidered).

signatures of both seller and purchaser.¹⁹⁶ Both Acts also make provision for the possibility that an agent may sign the document and here again, there is a discrepancy between the two statutes. An agent who signs on behalf of a surety does not need written authorisation to do so.¹⁹⁷ By contrast, written authority is required for an agent who signs on behalf of a seller or purchaser of land.¹⁹⁸ As a result, courts have been confronted with the problem of who, exactly, constitutes an “agent” for the purposes of the Alienation of Land Act.

Briefly, the requirement of written authority has been held to be applicable only to those representatives of principals who could have entered into the sale of land themselves. This conclusion was explained in *Potchefstroom Dairies and Industries Co., Ltd. v Standard Fresh Milk Supply Co.*:¹⁹⁹

¹⁹⁶ If two or more individuals act together as purchaser or seller, then the signature of all those individuals is required (see eg *D’Arcy v Blackburn, Jeffereys & Thorpe Estate Agency* 1985 2 SA 178 (E), discussed in Kerr *Sale and Lease* 79-80 and criticised in 85-88 on another point); the same principle applies if two or more sureties have intended to be liable as co-sureties (eg *Nelson v Hodgetts Timbers (East London) Ltd* 1973 3 SA 37 (A); *Industrial Development Corporation of SA Ltd v See Bee Holdings (Pty) Ltd* 1978 4 SA 136 (C); Forsyth & Pretorius *Suretyship* 80).

¹⁹⁷ Prior to its amendment by s 34 of the General Law Amendment Act 80 of 1964, s 6 of the General Law Amendment Act did not make provision for an agent to sign on behalf of the surety. In *Levitan, NO v Petrol Conservation (Pty), Ltd* 1962 3 SA 233 (W) (“*Levitan*”) the court concluded that this meant that the legislation required a surety to sign personally and that signature by an authorised representative was insufficient (239F-H). According to Forsyth & Pretorius *Suretyship* 68 and De Wet & Van Wyk *Kontraktereg* 1 393-394 n 14 it was presumably due to this decision that s 6 was amended to include the possibility that an agent may sign on behalf of a surety. There is no requirement that the agent be authorised in writing. If the legislature was indeed motivated by the *Levitan* decision to amend the relevant legislation, then it appears to have overlooked the concern raised in that case that oral authorisation defeats the object of certainty underlying the formal requirements imposed for suretyships (239G-H).

¹⁹⁸ Although the main text goes on to consider the meaning of “agent” in s 2(1), it should be pointed out that the requirement of written authorisation has been interpreted quite flexibly by South African courts. Any form of writing will suffice (see eg *Hugo v Gross* 1989 1 SA 154 (C) 162F-G) and it is unnecessary for the principal to append his signature to that document, provided it is clear that the authorisation emanated from the principal (a matter which may be proved through the admission of extrinsic evidence – see *Hugo v Gross* 1989 1 SA 154 (C) 163A-C; *Van der Merwe v D S S M Boerdery BK* 1991 2 SA 320 (T) 329F). A full discussion of the requirement of written authorisation, as well as other aspects relating to the topic of agency and sales of land is found in Kerr *Agency* 55 ff.

¹⁹⁹ 1913 TPD 506.

“[A] contract of sale, if not signed by the principal, must be signed by his agent ‘duly authorised in writing’. That must ... mean ‘authorised in writing by the principal’. The principal must therefore be capable of giving the agent the power which he is appointed to exercise. And for this purpose, he must be capable of exercising those powers himself. Moreover the use of the word ‘authorised’ points ... to an express authorisation as distinct from one arising by implication of law ... [T]he agency contemplated by the section is one expressly created by a person who could himself have exercised the delegated power had he chosen to do so. [Therefore] tutors, curators, corporations and partnerships are all excluded. Tutors and curators are excluded because the acts which they are appointed to perform are *ex hypothesi* acts which their wards cannot perform. Corporations are excluded because having neither minds nor hands of their own they cannot themselves do what their agents do for them. And partnerships are excluded because the agency of a partner for his co-partner is not expressly created but arises by implication of law as soon as the partnership relation is constituted.”²⁰⁰

The examples listed in the above quotation have been confirmed in subsequent decisions.²⁰¹ The deed of alienation will be void, however, if a trustee signs on behalf of a number of trustees,²⁰² or an executor on behalf of himself and his co-executor,²⁰³ without written authorisation.²⁰⁴

²⁰⁰ 512-513 per Bristowe J.

²⁰¹ See eg *Ten Brink NO v Motala* 2001 1 SA 1011 (D) 1013A-B (guardian and ward); *Muller v Pienaar* 1968 3 SA 195 (A) 201C-E (partner on behalf of partnership); *Trever Investments (Pty) Ltd v Friedhelm Investments (Pty) Ltd* 1982 1 SA 7 (A) 18F-G (director on behalf of company); *Northview Shopping Centre (Pty) Ltd v Revelas Properties Johannesburg CC* 2010 3 SA 630 (SCA) para 22 (member on behalf of a close corporation; this decision overturned *Lombaard v Droprop CC* 2009 6 SA 150 (N) which had held the opposite).

²⁰² *Thorpe v Trittenwein* 2007 2 SA 172 (SCA) para 15.

²⁰³ *Tabethe v Mtetwa, NO* 1978 1 SA 80 (D) 84B-85B.

²⁰⁴ Neither a trust, nor a deceased estate, is a legal *persona* - the assets and liabilities of the trust or the deceased estate vest in the co-trustees or co-executors respectively (*Thorpe v Trittenwein* 2007 2 SA 172 (SCA) para 9; *Tabethe v Mtetwa, NO* 1978 1 SA 80 (D) 84H). Unlike a partnership however (which is also not a legal *persona*), co-trustees and co-executors are not authorised by law to act on behalf of a trust or deceased estate. Therefore, in the absence of a contrary indication in the trust deed or will, co-trustees or co-executors must act jointly (*Thorpe v Trittenwein* 2007 2 SA 172 (SCA) para 9; *Tabethe v Mtetwa, NO* 1978 1 SA 80 (D) 84H-85A). To ensure that the signature of a single co-trustee or co-executor will render the deed of alienation binding, the other co-trustee(s) or co-executor(s) must therefore authorise the signatory in writing (*Thorpe v Trittenwein* 2007 2 SA 172 (SCA) paras 14-15; *Tabethe v Mtetwa, NO* 1978 1 SA 80 (D) 85B).

A point which has not yet been settled is whether a person who is not an officer of a company may act on behalf of that company without written authorisation to do so. For the sake of clarity, such a person will be referred to as an outside agent.²⁰⁵ Those cases which have held that written authorisation is not a requirement, have based their conclusion on the wording of section 69(1)(a) of the Companies Act 61 of 1973, which provided that

“[a]ny contract which if made between individual persons would by law be required to be in writing signed by the parties to be charged therewith may be made on behalf of the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.”

Cases which have held that this provision also applied to outside agents generally focused on two points. First, this section differed from its historical predecessor, section 74 of the Companies Act 31 of 1909, which specifically stated that an agent acting on behalf of a company required the written authority of the directors of that company. The change in wording was interpreted as a deliberate change in intention on the part of the legislature, leading to the inference that any representative acting on behalf of a company, whether an officer of the company or an outsider, might be authorised orally to do so.²⁰⁶ Secondly, and related to the first point, section 69(1)(a) referred to “any person” acting on behalf of the company, which was taken as an indication that the provision was intended to apply to outside agents as well.²⁰⁷

By contrast, some commentators held that section 69(1)(a) did not apply to outside agents because the section dealt only with the situation where the contract was signed “by the parties to be charged therewith” and not where the parties were represented by outside

²⁰⁵ *Icodev (Pty) Ltd v Viljoen* 1985 3 SA 824 (T) 828H; *Northview Shopping Centre (Pty) Ltd v Revelas Properties Johannesburg CC* 2010 3 SA 630 (SCA) para 11.

²⁰⁶ *Roodia Beleggings (Flora) (Edms) Bpk v Marais* 1979 4 SA 488 (T) 492A-F; *Icodev (Pty) Ltd v Viljoen* 1985 3 SA 824 (T) 829E-H.

²⁰⁷ *Roodia Beleggings (Flora) (Edms) Bpk v Marais* 1979 4 SA 488 (T) 492H; *Icodev (Pty) Ltd v Viljoen* 1985 3 SA 824 (T) 829I. It was also held in *Myflor Investments (Pty) Ltd v Everett NO* 2001 2 SA 1083 (C) 1096A-C that the phrase “any contract” in s 69(1)(a) was broad enough to include alienations of land and that this implied that the provision was intended to override the requirements of s 2(1) of the Alienation of Land Act.

agents.²⁰⁸ In other words, it was concerned with “the manner in which a company as a juristic person without an intellect of its own, is to express its intention to the outside world in a case where formal confirmation of that intention is required by law”.²⁰⁹ The section therefore focused on the requirements for the authorisation of officers of the company (which might include employees) which was derived from the memorandum and articles of association of the company, and which could be express or implied.²¹⁰ If the section were interpreted to apply to outside agents as well, it would lead to the peculiar result that a natural person would have to authorise his agent in writing, while a company might authorise an outside agent orally.²¹¹ Furthermore, while there can be no uncertainty as to the authority of an organ or officer of a company to act on its behalf (because that authority arises by implication of law), the same cannot be said of an outside agent who acts on behalf of such a company – permitting such an agent to act upon oral authority could give rise to the very uncertainty and disputes which the requirement of written authority in the Alienation of Land Act is intended to prevent.²¹²

There is no provision equivalent to section 69(1)(a) in the new Companies Act 71 of 2008. In light of the preceding discussion, it is argued that this means that both outside agents acting on behalf of companies and agents acting on behalf of individuals will now need to be authorised in writing before they may validly conclude a sale of land. Such consistency has the benefit of being logically appealing and, in addition, gives better effect to the evidentiary function of formalities.

²⁰⁸ See eg Van Rensburg & Treisman *Guide to the Alienation of Land Act* 62-63; J R Harker “The Authorization of an Agent Who Concludes a Contract for the Sale of Land On Behalf Of a Company” (1980) 97 SALJ 546 549. See also *Northview Shopping Centre (Pty) Ltd v Revelas Properties Johannesburg CC* 2010 3 SA 630 (SCA) para 14, in which the court doubted whether s 69(1)(a) was ever intended to be applicable to outside agents.

²⁰⁹ Van Rensburg & Treisman *Guide to the Alienation of Land Act* 63.

²¹⁰ 64.

²¹¹ Harker 1980 SALJ 549-550; Wulfsohn *Formalities* 153-154.

²¹² Harker 1980 SALJ 549; *Northview Shopping Centre (Pty) Ltd v Revelas Properties Johannesburg CC* 2010 3 SA 630 (SCA) para 26.

3 4 2 What is a signature?

There are no general statutory definitions of the terms “signature” and “to sign”.²¹³ Although the usual understanding of a signature is self-identification by the writing of one’s full name or initials and surname, other forms of identification have also been held to constitute a signature.²¹⁴ Thus, it is acceptable to sign with an ‘X’ or a thumbprint, or by means of initials only.²¹⁵ In common-law jurisdictions stamped,²¹⁶ printed²¹⁷ and typewritten signatures²¹⁸ have received judicial approval in the past, but the signature requirement imposed by the Law of Property (Miscellaneous Provisions) Act will only be satisfied by a handwritten signature.²¹⁹ In German law, only a handwritten signature or a notarially attested mark is acceptable.²²⁰

The validity of a signature is tested according to the function it fulfils. In *Jurgens*,²²¹ Hoexter JA held that

“[t]he function of a signature is to signify that the writing to which it pertains accords with the intention of the signatory. It conveys an attestation by the person signing of his approval and authority for what is contained in the document; and that it emanates from him”.²²²

²¹³ The discussion here focuses on handwritten signatures and paper-based documents. The possibility that a suretyship (but not an alienation of land) may be concluded electronically and the requirement of an advanced electronic signature were discussed in ch 1 (1 3 2).

²¹⁴ In *In re Trollip* (1895) 12 SC 243 246, it was held that “[to] sign one’s name, as distinguished from writing one’s name in full, is to make such a mark as will represent the name of the person signing the document.”

²¹⁵ *Putter v Provincial Insurance Co Ltd* 1963 3 SA 145 (W) 148H; *Van Niekerk v Smit* 1952 3 SA 17 (T) 25C-E.

²¹⁶ *Goodman v J Eban* LD [1954] 1 QB 550.

²¹⁷ *Brydges (Town Clerk of Cheltenham) v Dix* (1891) 7 TLR 215.

²¹⁸ *Newborne v Sensolid (Great Britain) LD* [1954] 1 QB 45.

²¹⁹ *Firstpost Homes Ltd v Johnson* [1995] 1 WLR 1567 1575-1576. The reasons for the court’s conclusion were first, that a handwritten signature requirement accorded with the common-sense understanding of a signature and secondly, that a stricter signature requirement would be in line with the purpose of the new Act, which was to promote certainty. It is, however, sufficient if the handwritten signature takes the form of initials, provided it is clear that such signature was intended to authenticate the contents of the document. See *Newell v Tarrant* 2004 WL 741782 para 47.

²²⁰ § 126 BGB.

²²¹ Also discussed above in 3 2 1.

²²² *Jurgens v Volkskas Bank* 1993 1 SA 214 (A) 220E.

One would assume that in order for a signature to fulfil this authenticating function, it would need to be appended to the document only once it has been completed. However, this approach has not been adhered to strictly by South African courts in relation to sales of land and suretyships.

3 4 3 When should the signature be appended to the agreement?

Neither section 2(1) of the Alienation of Land Act nor section 6 of the General Law Amendment Act specify when the written agreement should be signed: nothing is prescribed as to the sequence in which completion of the document and affixing of a signature must occur.²²³ This can become problematic when a party signs a document containing blank spaces, which are then completed subsequent to signature. In considering the South African courts' approach to this problem, no distinction is drawn between the signing of suretyships and sales of land because the rules outlined here have been held to be applicable to both types of agreements.²²⁴

Initially, the Appellate Division held in *Fourelmel (Pty) Ltd v Maddison*²²⁵ ("*Fourelmel*") that a party's signature should be appended to a completed document.²²⁶ The function of a signature is to indicate the adoption and approval of the recorded terms.²²⁷ This function cannot be fulfilled if a party signs what in effect amounts to a blank piece of paper.²²⁸ Furthermore, allowing the unilateral completion of the document by the other contracting party would open the door to fraud, perjury and unnecessary litigation.²²⁹

This broad conclusion was limited in the subsequent *Jurgens* decision. The court drew a distinction between a document signed in blank which is then delivered to the other

²²³ 220F.

²²⁴ In both *Just Names Properties 11 CC v Fourie* 2008 1 SA 343 (SCA) paras 16-21 and *Fraser v Viljoen* 2008 4 SA 106 (SCA) para 4, it was held that the rules relating to the signing of suretyships were equally applicable to alienations of land.

²²⁵ 1977 1 SA 333 (A).

²²⁶ 341G-H.

²²⁷ 342H.

²²⁸ 342A-B.

²²⁹ 342H-343C. Since the court had to decide on the formal validity of a suretyship, it also pointed out that the cautionary function of formalities would be subverted if a surety could be bound to a document which he had signed while it was still incomplete.

contracting party to complete (as in *Fourlame!*), and one which is signed in blank and subsequently completed by the signatory himself or his representative prior to delivery (the facts of *Jurgens*).²³⁰ According to the court, whether the document is signed before or after completion is irrelevant,²³¹ provided it is completed by the time of delivery to the other party.²³² This is due to the fact that a signature can still fulfil an authenticating function if it is appended to a document prior to completion.²³³

It is argued that the conclusion in *Jurgens* is one example of a successful resolution of the tension between “formalism” (which promotes certainty) and “flexibility” (which encourages fairness).²³⁴ While there would be a need to protect a surety who delivers a signed but incomplete agreement to the creditor from potentially fraudulent claims, the same concern does not arise when a surety signs an incomplete document and then completes the terms himself or authorises someone to do so on his behalf. In the latter case, it is the creditor’s reliance on an apparently valid agreement which should be protected against the resort to the mere technical defence of formal non-compliance.²³⁵

²³⁰ *Jurgens v Volkskas Bank* 1993 1 SA 214 (A) 219A-B.

²³¹ *Jurgens v Volkskas Bank* 1993 1 SA 214 (A) 221A-B. It is not entirely clear why this part of the judgment is criticised:

“The difficulty with the approach in [*Jurgens*] is that, if it is ‘immaterial’ whether signature preceded completion, it provides no principled basis for distinguishing between such a case – where the suretyship is completed by the agent of the surety after signature by the surety – and the case where the suretyship is completed by the creditor after delivery of the document to him – which all are agreed does not result in a valid suretyship.” (Forsyth & Pretorius *Suretyship* 79).

This criticism overlooks the fact that it is evident in the judgment that a *completed* document must be delivered to the creditor (see n 232 below).

²³² *Jurgens v Volkskas Bank* 1993 1 SA 214 (A) 219A-D, 220A-D; *Standard Bank of SA Ltd v Jaap de Villiers Beleggings (Edms) Bpk* 1978 3 SA 955 (W) 958D; *Fraser v Viljoen* 2008 4 SA 106 (SCA) para 4.

²³³ *Jurgens v Volkskas Bank* 1993 1 SA 214 (A) 220H-221A in which the court cites a passage from *Corbin on Contracts* (the passage is repeated in C N Brown *Corbin on Contracts 4: Statute of Frauds* §§ 12.1-23.11 (1997) 805) as support for this conclusion. Presumably, the court also intended the limitation in that passage to be applicable - a court must be satisfied that a signature appended prior to completion of the document was intended to fulfil an authenticating function.

²³⁴ See ch 2 (2 5).

²³⁵ A similar argument is made in Forsyth & Pretorius *Suretyship* 78.

In *Jurgens*, the written offers of suretyship were signed by the sureties and then completed on their behalf by their representatives before delivery to the creditor.²³⁶ This should be distinguished from the case where the signatory delivers a signed, incomplete document to the other contracting party and authorises the latter to complete the document. In *Fraser v Viljoen*²³⁷ the court concluded that the agreement would be invalid in this type of situation because the authorised party would be acting in the dual capacity of both contracting party and agent for the signatory.²³⁸ This would

“open the door to uncertainty as to precisely what the parties orally agreed upon and what the other party was authorised to do [and therefore] the object of certainty would disappear”.²³⁹

The cases discussed above all deal with the signing of an incomplete document where subsequent completion related to essential terms. However, it is possible that a document is signed in incomplete form while the blank space relates to a non-essential, albeit possibly material, term. In *Nedbank Ltd v Wizard Holdings (Pty) Ltd*²⁴⁰ (“*Wizard Holdings*”) the defendant sureties alleged that they signed suretyships which contained blank spaces making provision for the limitation of their liability. These incomplete agreements were then delivered to the plaintiff creditor, who inserted the word “unlimited” in the blank spaces.²⁴¹ The defendants argued that the omission of this word from their respective agreements at the time of signature rendered them formally invalid.²⁴²

The court’s point of departure was to engage in an analysis of case law relating to blank spaces in written agreements.²⁴³ According to one commentator,²⁴⁴ this missed the point of the sureties’ contention: the argument was not that the agreements were invalid

²³⁶ *Jurgens v Volkskas Bank* 1993 1 SA 214 (A) 217D.

²³⁷ 2008 4 SA 106 (SCA).

²³⁸ *Fraser v Viljoen* 2008 4 SA 106 (SCA) para 6. See also the *obiter* remarks to this effect in *Foullameel (Pty) Ltd v Maddison* 1977 1 SA 333 (A) 344B-D.

²³⁹ *Fraser v Viljoen* 2008 4 SA 106 (SCA) para 6. The position is the same in English law, where it is possible for a memorandum to be signed by one person as agent for both contracting parties, but one contracting party cannot sign as agent for the other. *Sharman v Brandt* (1871) L R 6 QB 720; *Wright v Dannah* (1809) 2 Camp 203.

²⁴⁰ 2010 5 SA 523 (GSJ).

²⁴¹ Para 12.

²⁴² Para 13.

²⁴³ Para 14 ff.

²⁴⁴ Sharrock 2010 ASSAL 567.

because they omitted a term which should have been in writing, but rather that the agreements had not been completed by the time they had been signed and delivered to the plaintiff. This criticism is rather harsh. The court's analysis was not irrelevant, but simply incomplete: it failed to discuss, as a preliminary issue, how a court should approach a document that has been signed while it still contains a blank space.

It was stated above that the correct time to determine whether a document is complete is when it is delivered to the other contracting party. In other words, if the document still contains blank spaces at the time of delivery, it is that ostensibly incomplete recordal which must be examined.²⁴⁵ Where a blank space relates to an essential term, as was the case in *Fourlamel*, the agreement will be invalid. If it relates to a non-essential term, the question is whether the parties intended that such term should form part of their written agreement. Sometimes this is a question which can only be answered through the admission of extrinsic evidence.²⁴⁶ Often however, the problem can be solved simply as a matter of construction or interpretation of the document.²⁴⁷ The facts of *Wizard Holdings* fall into this latter category.

²⁴⁵ This point is specifically made in *Standard Bank of SA Ltd v Jaap de Villiers Beleggings (Edms) Bpk* 1978 3 SA 955 (W) 958H, and it is implicit in the approach adopted in *Just Names Properties 11 CC v Fourie* 2008 1 SA 343 (SCA) paras 21-22. Despite the fact that the document in the latter case appeared to record a complete sale of land, the court nevertheless considered its formal validity at the time that it was released for delivery to the purchaser. At that stage, the purported agreement contained two blank pages initialled by the sellers: they had rejected a clause proposed by the purchaser and the estate agent, who had acted as intermediary between the parties, suggested that they initial blank pages which would then be completed by her to reflect the amended agreement. The court concluded that the agreement was formally invalid, because it was signed while still incomplete. It should be pointed out that the court's conclusion was based upon the assumption that the sellers' rejection of the relevant clause did not transform their acceptance into a counter-offer (paras 18-20). This analysis has been rightly criticised, *inter alia* on the basis that the sellers would not have concluded the agreement if their proposed amendment had not been accepted. See Sharrock 2010 ASSAL 391-392, which should be read together with his argument that the estate agent in this case was given a mandate by the sellers to change the terms of the offer on their behalf – "Contract" (April-June 2007) JQR para 2.3.2 <<http://ipproducts.jutalaw.co.za.ez.sun.ac.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu>> (accessed 05-11-2012).

²⁴⁶ See *Johnston v Leal* 1980 3 SA 927 (A) and the discussion in in ch 4 (4 3 2).

²⁴⁷ *Standard Bank of SA Ltd v Jaap de Villiers Beleggings (Edms) Bpk* 1978 3 SA 955 (W) 959A; *Johnston v Leal* 1980 3 SA 927 (A) 940G-941A; *Pizani v First Consolidated Holdings (Pty) Ltd* 1979 1 SA 69 (A) 80G-H.

Although a term limiting a surety's liability could be a material term if the parties had agreed upon it,²⁴⁸ it is nevertheless a term which operates for the benefit of the surety.²⁴⁹ If the surety signs the document without completing that term, the more probable inference is that the parties never intended the clause to form part of their agreement and that the suretyship would be unlimited.²⁵⁰ The term is then regarded as *pro non scripto*,²⁵¹ and the agreement will be formally valid.

The suretyships which were delivered to the plaintiff in the *Nedbank* case therefore constituted the complete agreement between the parties, in spite of the fact that the documents contained a blank space relating to the possible limitation of liability. The subsequent completion of that blank space by the plaintiff was irrelevant, because it simply confirmed what the parties had agreed upon, namely that the suretyships were intended to be unlimited.²⁵² While it is argued that this conclusion is correct, it is somewhat odd that the court chose to confine itself only to a consideration of the defendants' affidavit and the fact that there was no allegation that the parties had intended the suretyships to be limited to a certain amount.²⁵³ According to the court, this led to the irresistible inference that the intention was always to conclude unlimited suretyships. Possibly this inference would have been more irresistible had the court supported its conclusion also by reference to clause 1 of the suretyships themselves and the fact that it was worded in a manner which suggested that the sureties had agreed to unlimited liability.²⁵⁴

²⁴⁸ *Nedbank Ltd v Wizard Holdings (Pty) Ltd* 2010 5 SA 523 (GSJ) para 16; *Pizani v First Consolidated Holdings (Pty) Ltd* 1979 1 SA 69 (A) 81B-C.

²⁴⁹ *Pizani v First Consolidated Holdings (Pty) Ltd* 1979 1 SA 69 (A) 81G.

²⁵⁰ *Nedbank Ltd v Wizard Holdings (Pty) Ltd* 2010 5 SA 523 (GSJ) para 22; *Pizani v First Consolidated Holdings (Pty) Ltd* 1979 1 SA 69 (A) 81F; *Johnston v Leal* 1980 3 SA 927 (A) 941B-C; D J Joubert "Blanko Spasies" (1973) 36 *THRHR* 285 288.

²⁵¹ *Nedbank Ltd v Wizard Holdings (Pty) Ltd* 2010 5 SA 523 (GSJ) paras 15, 18-19; *Johnston v Leal* 1980 3 SA 927 (A) 941A-C.

²⁵² *Nedbank Ltd v Wizard Holdings (Pty) Ltd* 2010 5 SA 523 (GSJ) para 28.

²⁵³ Para 28.

²⁵⁴ In part, the relevant clause read that the surety bound himself

"as surety and co-principal debtor . . . for the repayment on demand of all amounts which the principal debtor may now or at any time hereafter owe Nedbank Ltd" (*Nedbank Ltd v Wizard Holdings (Pty) Ltd* 2010 5 SA 523 (GSJ) para 12).

Cf Pizani v First Consolidated Holdings (Pty) Ltd 1979 1 SA 69 (A) 81H-82A, in which similar clauses were held to support the court's conclusion that the relevant suretyships were intended to be unlimited. These

In conclusion then, the sequence in which a document is signed and its terms completed is irrelevant, provided a complete document is delivered to the other contracting party. A document can still be complete if it contains a blank space at the time of delivery, provided it does not relate to the *essentialia* of the agreement and provided the parties did not intend that term to form part of their agreement. What is not permissible is for the other contracting party to complete the document unilaterally, or to act as representative of the signatory and complete it on his behalf.

3 5 Conclusion

This chapter has considered some basic principles relevant to the interpretation of formal requirements prescribed for sales of land and suretyships in South African law. Fundamental to an understanding of the South African approach is that the document which is examined for the purposes of determining formal validity must embody the parties' agreement.²⁵⁵ We have seen that this requirement may be met even if the document records the declaration of intention of one party alone, provided that the performance is unilateral and provided that the relevant statutory formalities do not prescribe that the document should be signed by both parties. As we shall see in subsequent chapters, the notion that the document constitutes the embodiment of the parties' agreement has a profound impact on the rules relating to extrinsic evidence,²⁵⁶ rectification²⁵⁷ and the remedies available to a party in the event of formal invalidity.²⁵⁸

A further distinction considered in this chapter has been the difference between material and non-material terms.²⁵⁹ It was argued that material terms (insofar as these do not relate to the essential terms of the parties' agreement) constitute all the *incidentalia* of the parties' agreement. However, the mere fact that the parties have (orally) agreed upon a material term should not render the written agreement formally invalid if it is not included in

clauses were considered in conjunction with the appellants' plea (81C-E) which contained no allegation that the parties had agreed on a limitation of liability as a material term of their agreement.

²⁵⁵ 3 2 1.

²⁵⁶ Ch 4.

²⁵⁷ Ch 5.

²⁵⁸ Ch 6.

²⁵⁹ 3 2 2.

it – there must be an indication in the document itself that the parties intended to regulate their contractual relationship by means of certain additional terms.

This chapter has also highlighted certain general principles which will guide a court in the determination of the formal validity of a specific sale of land or suretyship.²⁶⁰ Meticulous accuracy in the recordal of a term is not required – objective ascertainability will suffice. Furthermore, if a document lends itself to an interpretation consistent with formal validity, then that is the interpretation which will be adopted by the court. Finally, the document should be examined as a whole in order to determine whether the agreement complies with formal requirements.

The last two principles seem to have been ignored in recent cases which have held that an agreement which appears to have been concluded by a party acting in his personal capacity, but who is acting on behalf of an unnamed or undisclosed principal, is formally invalid. It is argued that contrary to these decisions, the agreement is not formally invalid: *ex facie* the document, all the essential and other material terms have been recorded. However, in the case of an unnamed principal, the agreement is in all likelihood substantively invalid – neither the agent nor the other contracting party intended that the former would be personally liable. This lack of consensus on what appears *ex facie* the written agreement will render it void. By contrast, an agreement concluded by an intermediary in the interests of an undisclosed principal will be both formally and substantively valid, but only against the intermediary: he intends to conclude the contract in his personal capacity and to be the bearer of rights and duties in terms of that agreement. The undisclosed principal will not be able to sue or be sued in terms of an agreement subject to formalities. The reason for this conclusion is not because the document does not identify the principal, but rather because the principal has not signed it. For this reason, it is argued that the only sphere of application of the doctrine of the undisclosed principal is where the principal wishes to sue as creditor in terms of a suretyship, because it is not a requirement that the creditor signs the agreement.

²⁶⁰ 33.

Finally, this chapter has considered certain aspects surrounding such signatures as are required.²⁶¹ Particular attention was paid to when the agreement should be signed: the general rule is that the signed document must be complete by the time it is delivered to the other contracting party (or, in the event of reciprocal obligations where the agreement consists of two written declarations of intent, each document must be complete by the time of delivery). The notion of what constitutes a complete recordal should also not be interpreted literally: a document which contains blank spaces may nevertheless reflect a complete agreement, provided those blank spaces do not relate to essential terms. In such a case, a court may be able to reach a conclusion of formal completeness simply upon a reasonable construction of the document as a whole. In others, a court will need to resort to extrinsic evidence to reach a conclusion. This latter scenario, and other instances of the admissibility of extrinsic evidence, serve as the focus of the next chapter.

²⁶¹ 34.

CHAPTER 4: STATUTORY FORMALITIES, THE PAROL EVIDENCE RULE AND THE ADMISSIBILITY OF EXTRINSIC EVIDENCE

4 1 Introduction

The previous chapter considered the way in which South African courts have interpreted the formal requirements imposed by the Alienation of Land Act and the General Law Amendment Act. It is apparent that these Acts have been interpreted in a manner that requires all the material terms of the agreement to be embodied in a written document. Passing reference was also made to instances where extrinsic evidence was admitted.

The current chapter will set out in greater detail when and why extrinsic evidence is admissible and how South African courts reconcile this with the parol evidence rule and the statutory requirement that all material terms of the agreement be reduced to writing.¹ Particular attention will be paid to the principle of incorporation by reference, as applied in the South African context² and in certain common-law jurisdictions.³ Due to the important role played by the parol evidence rule in the context of the admissibility of extrinsic evidence, the next section will set out the parameters of this rule and its relationship to statutory formalities. Reference will also be made, where relevant, to similar aspects in German law, which does not appear to recognise anything resembling the parol evidence rule, but which does also recognise that contracts which are required to be in writing should not be amended too easily on the basis of extrinsic evidence.

4 2 The admissibility of extrinsic evidence

4 2 1 Introduction

There are two rules which generally preclude the admission of extrinsic evidence in the context of agreements subject to formalities. First, there is the requirement that the terms of a contract that is required by law to be in writing must appear from the written document itself: where the written document is incomplete, it cannot be supplemented by extrinsic

¹ 4 2-4 3 below.

² 4 4 1.

³ 4 4 2.

evidence.⁴ To admit extrinsic evidence in this instance would subvert at least some of the objects of formalities legislation, namely to minimise uncertainty and disputes.⁵

The consequence of this rule was set out in *Van Wyk v Rottcher's Saw Mills (Pty) Ltd*⁶ where Watermeyer CJ said the following:

“In a simple written contract which need not by law be in writing it is possible to describe a piece of land by reference, e.g. the land agreed upon between the parties, and in that case testimony as to the making of the oral agreement may be admissible to identify the land, but when a contract of sale of land is by law invalid unless it is in writing, then it is not permissible to describe the land sold as the land agreed upon between the parties. Consequently testimony to prove an oral consensus between the parties which is not embodied in the writing is not admissible for any purpose, not even to identify the land sold.”⁷

Secondly, if a contract constitutes the exclusive memorial of the agreement, the parol evidence rule also precludes the admission of extrinsic evidence, to the extent that such evidence adds to, varies or contradicts a contract reduced to writing (this rule applies irrespective of whether formalities are imposed).⁸ The rule itself is said to consist of two independent sub-rules. The “integration rule” determines the extent to which extrinsic evidence may be used to prove the terms of the written contract:⁹ it defines “the limits of the contract”.¹⁰ The “interpretation rule” determines the extent to which extrinsic evidence is admissible to interpret the meaning of the terms used in that contract.¹¹

⁴ *African Lumber Co (Pvt) Ltd v Katz* 1978 4 SA 432 (C) 434H-435A; *Industrial Development Corporation of SA (Pty) Ltd v Silver* 2003 1 SA 365 (SCA) para 9.

⁵ See the discussion on the functions of formalities in ch 2 (2 3).

⁶ 1948 1 SA 983 (A).

⁷ 989.

⁸ *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 47.

⁹ *Johnston v Leal* 1980 3 SA 927 (A) 943A; S W J van der Merwe, L F van Huysteen, M F B Reinecke & G F Lubbe *Contract - General Principles* 4 ed (2012) 149; R H Christie & G B Bradfield *Christie's The Law of Contract* 6 ed (2011) 200-201.

¹⁰ *Johnston v Leal* 1980 3 SA 927 (A) 943A. Or, as D T Zeffertt & A Paizes *Parol Evidence with Particular Reference to Contract* (1986) 1 state, the integration rule deals with the question of the written document's “conclusiveness”. It should be pointed out that A J Kerr *The Principles of the Law of Contract* 6 ed (2002) 354 considers this part of the parol evidence rule to be an expression of the doctrine of quasi-mutual assent and refers to *Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty) Ltd* 1962 3 SA 143 (A) to support his conclusion. However, in that case the court relied on the doctrine to justify its finding that the appellant was bound to a term contained in a letter sent to it by the respondent and which modified a written lease agreement. Because the appellant failed to react to the term proposed in the letter (but nevertheless signed

The rationale for the parol evidence rule is that it is supposed to promote certainty, minimise disputes and restrict the risk of perjury.¹² Where a contract is statutorily required to be reduced to writing, the parol evidence rule therefore tends to be supportive of the functions served by formalities themselves.¹³ This functional overlap between the parol evidence rule and statutory formalities is not mere coincidence: the final stage in the development of the parol evidence rule in England is linked to the promulgation of the Statute of Frauds in 1677. In terms of the Statute's original provisions, certain transactions could be validly concluded only if they were reduced to writing. According to Wigmore,¹⁴

“[t]he scope of these provisions was limited; but their moral and logical influence was wide and immediate. The [S]tatute now began to be appealed to, in all questions of ‘parol evidence,’ as setting an example and typifying a general principle.”¹⁵

Thus, the impact of the Statute of Frauds was broader than the scope of its direct application: where a transaction had been reduced to writing, that writing was regarded as the sole memorial of the parties' agreement, and extrinsic evidence was regarded as inadmissible, irrespective of whether that agreement fell within the scope of the Statute.¹⁶

the written lease agreement after receipt of the letter), the court concluded that it was bound to the terms of the modified lease agreement (148G-149B). The court specifically pointed out that the parol evidence rule was not applicable and that the respondent could not be held to the terms of the written lease agreement alone, because that agreement was not intended to be an integration of all the terms of the contract between the appellant and respondent (149H-150B). It is unclear therefore, how this decision supports Kerr's argument that the parol evidence rule (or at least that part of it known as the integration rule) reflects the doctrine of quasi-mutual assent.

¹¹ *Johnston v Leal* 1980 3 SA 927 (A) 943A; Van der Merwe et al *Contract* 149; Christie & Bradfield *Contract* 212. The boundaries between the two sub-rules are not always very clear – see 4 2 3.

¹² See eg *Du Plessis v Nel* 1952 1 SA 513 (A) 534C-E per Van den Heever JA; G F Lubbe & C Murray *Farlam & Hathaway Contract - Cases, Materials and Commentary* 3 ed (1988) 216 n 2; Van der Merwe et al *Contract* 152-153.

¹³ A L Corbin “The Parol Evidence Rule” (1944) 53 *Yale LJ* 603 609.

¹⁴ “A Brief History of the Parol Evidence Rule” (1904) 4 *Colum LR* 338.

¹⁵ 352. See also English Law Commission *The Law of Contract: The Parol Evidence Rule (Law Com No 154)* (1986) para 2.3.

¹⁶ Wigmore 1904 *Colum LR* 352-353; T Cole “The Parol Evidence Rule: A Comparative Analysis and Proposal” (2003) 26 *UNSW LJ* 680 687.

The parol evidence rule was received in South Africa from English law on the assumption that it constituted a rule of evidence.¹⁷ However, many have pointed out that the rule is, or may be, a rule of substantive law in which case it should never have been received in South African law at all.¹⁸ Not only does the reception of the rule rest on these dubious foundations, but it is anomalous in a legal system whose point of departure is that contractual liability is based upon the parties' intention.¹⁹ The rule, of course, precludes evidence of this intention.

Even in England, consideration was given to the question whether the rule should be abolished (or at least, that part of the rule known as the integration rule) by means of legislation to this effect. In 1986, the English Law Commission decided that legislation was unnecessary, because the rule no longer had the scope or effect it once did and, in particular,

“no parol evidence rule today requires a court to exclude or ignore evidence which should be admitted or acted upon if the true contractual intention of the parties is to be ascertained and effect given to it.”²⁰

The reason why the Commission came to this conclusion was due to the existence of the many so-called “exceptions” to the integration leg of the rule. It is the existence of these many exceptions that has led at least one commentator to state that the rule, if not dead, has at least been *semivivus* for quite some time.²¹

From a civil law perspective, the parol evidence rule

“has always seemed to be a quaint confusion of the law of evidence and the substantive law on contractual interpretation.”²²

¹⁷ *Stiglingh v Theron* 1907 TS 998 1007; *Cassiem v Standard Bank of South Africa* 1930 AD 366 369; *Venter v Birchholtz* 1972 1 SA 276 (A) 282C-D; Van der Merwe et al *Contract* 148.

¹⁸ See eg *Schroeder v Vakansieburo (Edms) Bpk* 1970 3 SA 240 (T) 242E-G; *Von Ziegler v Superior Furniture Manufacturers (Pty) Ltd* 1962 3 SA 399 (T) 403C-F; Zeffertt & Paizes *Parol Evidence* 14-15.

¹⁹ Van der Merwe et al *Contract* 152; Zeffertt & Paizes *Parol Evidence* 24-25.

²⁰ *The Parol Evidence Rule* para 1.7. By contrast, legislation was thought to be necessary to abolish the parol evidence rule in Scotland – see s 1 of the Contract (Scotland) Act 1997.

²¹ S Vogenauer “Interpretation of Contracts: Concluding Comparative Observations” in A Burrows & E Peel (eds) *Contract Terms* (2007) 123 135.

²² 135.

Thus, in German law all types of extrinsic evidence are admissible, including subjective statements of intent (whether prior, simultaneous or subsequent to contract conclusion), previous negotiations, and subsequent conduct.²³ This does not mean that written contracts are subject to being changed at the slightest hint that the extrinsic evidence suggests a conflict with the written text. A document is presumed to be a complete and accurate recordal of the parties' agreement; extrinsic evidence regarding its content is admissible, but the weight afforded to such evidence is less if it conflicts with the written text.²⁴ This presumption of completeness and accuracy is even stronger when the agreement is statutorily required to be in writing.²⁵ In such a case, a German court will engage in a two-step process. First, it will determine the content and meaning of the contract, weighing the relevant extrinsic evidence in light of the presumption of completeness. In certain cases, the weight of the extrinsic evidence is sufficient to dispel the presumption and leads to a result which is not evident from the literal meaning of the contract. As a second step therefore, a court is required to determine whether the contract is valid with this new content. To prevent the circumvention of the relevant formal requirement, a court will only reach a conclusion of validity if there is an allusion to, or some indication of, the true content of the contract in the written document itself. This approach is referred to as the *Andeutungstheorie* ("theory of indication"). If there is no such allusion, the contract will be void for failure to comply with the relevant formalities because "the formal requirement has not been adhered to if the content of the contract cannot be established from the written words".²⁶

The *Andeutungstheorie* tries to maintain a balance between giving effect to the parties' actual intention and the need to promote the evidentiary function of statutory formalities.²⁷ Nevertheless, the theory is severely criticised on the basis that it is vague and may give rise to artificial interpretations of the written agreement – a court may conclude that there

²³ 135.

²⁴ 137-138. See also BGH NJW 2002, 3164 (translated by Vogenauer "Interpretation" in *Contract Terms* 137).

²⁵ Vogenauer "Interpretation" in *Contract Terms* 138.

²⁶ 139.

²⁷ 139.

is an “indication” or allusion to terms which will add to or contradict the written text in any situation where it wishes to achieve a desired result.²⁸

The process adopted by South African courts is the opposite of that adopted by German courts. As we have seen, German courts generally allow extrinsic evidence as to content and meaning and only then determine whether the agreement is valid in the light of this extrinsic evidence. As a result of the interaction between the parol evidence rule and statutory formalities, South African courts determine first, whether a valid contract has been concluded (with particular terms) and then what the terms of that contract mean.

4 2 2 The limitations on the use of extrinsic evidence to prove the terms of a written contract in South African law

The limitations on the admissibility of extrinsic evidence in determining whether a valid contract has been concluded were described in *Johnston v Leal*²⁹ (“*Johnston*”). Both the parol evidence rule and formalities legislation preclude extrinsic evidence of prior or contemporaneous agreements which vary, alter, add to or supplement the written contract.³⁰ While the parol evidence rule does not exclude evidence of prior or contemporaneous agreements which do not alter or supplement the agreement, formalities legislation excludes such agreements where they purport to contradict the written agreement, by virtue of the rule that all material terms of the contract must be reduced to writing.³¹ Finally, the parol evidence rule does not exclude evidence of subsequent oral agreements, but formalities legislation will have such an effect if the oral agreement seeks to contradict, alter, vary or supplement a material term of the contract.³²

²⁸ Vogenauer “Interpretation” in *Contract Terms* 139. See also B Markesinis, H Unberath & A Johnston *The German Law of Contract: A Comparative Treatise* 2 ed (2006) 138; J Busche “§ 133” in F J Sacker (ed) *Münchener Kommentar zum Bürgerlichen Gesetzbuch 1 Allgemeiner Teil: §§ 1-240* 5 ed (2006) n 57.

²⁹ 1980 3 SA 927 (A).

³⁰ 938C-F.

³¹ 938H-939A.

³² *Johnston v Leal* 1980 3 SA 927 (A) 938F-G; A J Burger “The Parol Evidence Rule in Contract” (1996) 31 *TM* 141 142; Corbin 1944 *Yale LJ* 607; *Venter v Birchholtz* 1972 1 SA 276 (A) 282E-G.

4 2 3 The limitations on the use of extrinsic evidence to interpret a written contract in South African law

The Supreme Court of Appeal has recently had the opportunity to pronounce on the current approach to interpretation in South African law. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,³³ Wallis JA held:

"Interpretation is the process of attributing meaning to the words used in a document ... having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document ... [T]he proper approach to the interpretation of documents ... [is] that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate."³⁴

While it is not a core aspect of this thesis to analyse the South African approach to the interpretation of written contracts in general, it is necessary to make some remarks on the

³³ 2012 4 SA 593 (SCA).

³⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) paras 18-19 (footnotes omitted). The judgment reiterates the notion that a contract should be interpreted in a manner which gives it a commercially sensible meaning (see eg *Ekhuruleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 2 SA 498 (SCA) para 13) and its description of the approach to interpretation as a whole has been accepted as correct in *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd* (759/11) [2012] ZASCA 126 (21-09-2012) para 5 and *Khula Enterprise Finance Limited v Geldenhuys* 2012 JDR 2210 (SCA) para 18.

above quotation in order to determine its impact on the interpretation of agreements subject to formalities in particular.

First, the process of interpretation is described as objective: its purpose is not to ascertain the common intention of the parties,³⁵ but to determine the meaning that the document would convey to a reasonable person in the position of the parties.³⁶ Secondly, in order to place the interpreter in the position of the parties, the document or provision must be read in context, which includes “the circumstances attendant upon [the contract] coming into existence”.³⁷

At first glance this phrase is broad enough to include evidence of prior negotiations as part of the context, but not evidence of subsequent conduct (because this can never explain the background to the conclusion of the contract). However, such an interpretation is not supported by other South African case law.

For example, in *KPMG Chartered Accountants (SA) v Securefin Ltd*,³⁸ Harms DP abolished the distinction between “background” and “surrounding” circumstances, as well as the prerequisite of ambiguity before evidence of the latter could be admitted.³⁹ All

³⁵ According to Wallis JA, describing the process of interpretation as an attempt to determine the parties’ common intention is counter-productive – see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) paras 20-24 as well as M Wallis “What’s in a Word? Interpretation through the Eyes of Ordinary Readers” (2010) 127 SALJ 673 675-677. Wallis JA’s views on contractual interpretation in general are closely aligned with those of Lord Hoffmann – see L Hoffmann “The Intolerable Wrestle with Words and Meanings” (1997) 114 SALJ 656 and his judgment outlining the principles of interpretation in English law in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 912-913, both of which are variously cited or discussed by Wallis 2010 SALJ 683-685.

³⁶ This is not stated explicitly in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA), but that this is what is meant by adopting an objective approach is evident in Wallis 2010 SALJ 682, 686 and *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd* (759/11) [2012] ZASCA 126 (21-09-2012) para 15 (in which the court’s judgment was also delivered by Wallis JA). See also *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 912.

³⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) para 18.

³⁸ 2009 4 SA 399 (SCA).

³⁹ *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 4 SA 399 (SCA) para 39; *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd* 2008 6 SA 654 (SCA) para 7. Prior to these cases, the traditional approach to contractual interpretation was that set out in *Coopers & Lybrand v Bryant* 1995 3 SA 761 (A): the point of departure was to interpret the contract by looking at the literal meaning of the words, together with the context in which they were used and “background circumstances” explaining the genesis and purpose of the contract (767E-768). Only if the meaning of the terms proved to be ambiguous could the

evidence, according to the court, was admissible as part of the “factual matrix” of the contract.⁴⁰

Harms DP did not explain what he intended with the term “factual matrix”. The term itself echoes the terminology used by Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society*,⁴¹ (“ICS”) which is regarded as the leading case on contractual interpretation in current English law.⁴² However “factual matrix” as it is used in the English sense excludes evidence of the parties’ prior negotiations,⁴³ as well as evidence of subsequent conduct.⁴⁴ It is unclear to what extent Harms DP intended these limitations on the different types of extrinsic evidence also to apply in the South African context, because he did not refer to *ICS* at all. As a result, some cases and commentators interpret “factual matrix” to mean all evidence, including that of prior negotiations and subsequent conduct,⁴⁵ except direct evidence of a party’s intention.⁴⁶ More recently however, Wallis JA has held that evidence regarding the parties’ prior negotiations is inadmissible⁴⁷ but that the opposite is true of subsequent conduct.⁴⁸ If the parties’ conduct subsequent to the

court consider extrinsic evidence of the parties’ prior negotiations and subsequent conduct (768C-D), or the so-called “surrounding circumstances”.

⁴⁰ *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 4 SA 399 (SCA) para 39.

⁴¹ [1998] 1 WLR 896.

⁴² See eg G McMeel *The Construction of Contracts: Interpretation, Implication, and Rectification* 2 ed (2011) 26 ff; K Lewison *The Interpretation of Contracts* 5 ed (2011) 1 ff.

⁴³ *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 989.

⁴⁴ A Burrows “Construction and Rectification” in A Burrows & E Peel (eds) *Contract Terms* (2007) 77 81 n 21. The exclusion of these types of evidence is criticised: see Burrows “Construction and Rectification” in *Contract Terms* 81 ff; G McMeel “Prior Negotiations and Subsequent Conduct – The Next Step Forward for Contractual Interpretation?” (2003) 119 *LQR* 272 293-295; D Nicholls “My Kingdom for a Horse: The Meaning of Words” (2005) 121 *LQR* 577.

⁴⁵ *Grobler v Oosthuizen* 2009 5 SA 500 (SCA) para 13-14; *Mkhize v Umvoti Municipality* 2010 4 SA 509 (KZP) para 17; C Maxwell “Interpretation of Contracts” in D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 2 ed (2012) 255 264.

⁴⁶ According to Maxwell “Interpretation of Contracts” in *The Law of Contract in South Africa* 264-265, direct evidence of a party’s intention as an aid to interpretation is probably still excluded, even after *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 4 SA 399 (SCA), because its admission would lead to uncertainty and endless disputes.

⁴⁷ *Van Aardt v Galway* 2012 2 SA 312 (SCA) para 9.

⁴⁸ *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd* (759/11) [2012] ZASCA 126 (21-09-2012) para 15. This is somewhat odd, considering Wallis JA’s express approval of the English approach to contractual interpretation (see eg the authorities referred to *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) paras 18-20 and Wallis 2010 *SALJ* 685 ff). One possible explanation is that Wallis JA is under the impression that it is only evidence regarding prior negotiations which is excluded

conclusion of the contract is regarded as a reliable indicator of the meaning of that contract, then it is not self-evident why evidence regarding prior negotiations is inadmissible, particularly in view of the fact that this may be an even better indicator of the meaning of the contract.⁴⁹ Furthermore, it is not entirely clear whether Wallis JA intended to exclude all evidence of prior negotiations, or only that relating to a party's individual intent. For example, if there is written correspondence indicating that *both* parties attached a particular meaning to a word or phrase in the contract, must this evidence also be excluded simply because it originates from prior negotiations?⁵⁰

Again, it is beyond the scope of this thesis to engage comprehensively with the ramifications of the current approach to interpretation in South African law. However, it is suggested that South African courts should consider adopting a more flexible approach to contractual interpretation by admitting evidence of the parties' negotiations where such evidence establishes objectively what the parties meant with a particular provision or phrase. Such an approach would not have to be applied restrictively in the context of agreements subject to formalities. Using the example in the previous paragraph, one could hardly argue that there is a danger of fraud or perjury where the evidence (in the form of correspondence) of what the parties intended is objective. More generally, such an approach to contractual interpretation would have the added benefit of being in line with international instruments on this topic.⁵¹

in English law (see eg his statement in Wallis 2010 *SALJ* 686), an impression which is not borne out by English case law – see eg *Whitworth Street Estate (Manchester) Ltd v James Miller & Partners Ltd* [1970] AC 583 614-615 and *Wickman Machine Tool Sales Ltd v L Schuler AG* [1974] AC 235 261, in which Lord Wilberforce stated that

“[i]t is one and the same principle which excludes evidence of statements, or actions, during negotiations, at the time of the contract, or subsequent to the contract”.

According to McMeel 2003 *LQR* 276,

“[p]resumably [this] common principle is that both prior negotiations and subsequent conduct are unhelpful in that they do not record the consensus at the moment when contractual responsibility crystallises.

⁴⁹ The same argument is made by D McLauchlan “Contract Interpretation: What Is It About?” (2009) 31 *SLR* 5 48.

⁵⁰ Admitting evidence of this type does not contradict the characterisation of the process of interpretation as objective. See Burrows “Construction and Rectification” in *Contract Terms* 82-83; McLauchlan 2009 *SLR* 12-13.

⁵¹ See Art II.-8.102 of the *Draft Common Frame of Reference* (2009) and Art 4.3 of the *Principles of International Commercial Contracts* (2010). Both international instruments list, as matters relevant to

Although the discussion above proceeds from the assumption that a clear distinction can be drawn between the integration and interpretation sub-rules of the parol evidence rule, in practice the distinction is less easy to draw and to some extent, the two overlap.⁵² For example, extrinsic evidence is admissible for identification purposes.⁵³ This appears to be as much an application of extrinsic evidence to determine what a term means, as it is an attempt to determine whether the term itself is sufficiently ascertainable and whether, therefore, a valid contract has been concluded. For this reason, the discussion below on the types of admissible and inadmissible extrinsic evidence will simply refer to the parol evidence rule as a whole, unless a particular problem relates only to one of the two sub-rules.

4 3 Some specific illustrations of admissible and inadmissible extrinsic evidence where agreements are subject to formalities

Despite the interaction of the parol evidence rule and statutory formalities, the following examples will illustrate that admission of extrinsic evidence in the case of agreements subject to formalities is not absolutely prohibited.

4 3 1 Identification

It is permissible to lead extrinsic evidence to identify the actual creditor, principal debtor or surety from a listed group of potential creditors, principal debtors or sureties.⁵⁴ Similarly, where the suretyship agreement refers to a future obligation, a court will admit extrinsic evidence to prove both that the principal debt has indeed arisen and what it amounts to.⁵⁵ The description of the land to be alienated may be supplemented by extrinsic evidence to

interpretation, the parties' prior negotiations and conduct subsequent to contract conclusion. The argument in the main text is also made, *inter alia*, by McMeel 2003 LQR 289 in relation to the current English approach to contractual interpretation which he describes as "an increasingly isolated one".

⁵² See also Maxwell "Interpretation of Contracts" in *The Law of Contract in South Africa* 257.

⁵³ See 4 3 1 below.

⁵⁴ Eg *African Lumber Co (Pvt) v Katz* 1978 4 SA 432 (C) 435A-G (potential creditors identified as "Plate Glass Industries (Rhodesia) Ltd and each of its subsidiaries"); *Du Toit v Barclays Nasionale Bank Bpk* 1985 1 SA 563 (A) 569H-I (potential principal debtors described as "A and/or B").

⁵⁵ *Sapirstein v Anglo African Shipping Co (SA) Ltd* 1978 4 SA 1 (A) 12A.

indicate its precise location and boundaries.⁵⁶ Finally, extrinsic evidence is also admissible where a description in a written contract could apply to more than one person or thing. In such circumstances extrinsic evidence may be resorted to in order to establish which of the persons or things is actually referred to in the written document.⁵⁷

While the instances of the admission of extrinsic evidence referred to above may appear to be exceptions to the parol evidence rule and the objects of statutory formalities, it was pointed out in previous chapters that, although the material terms of agreements subject to formalities are required to be in writing, absolute certainty is not required.⁵⁸ *Certum est quod certum reddi potest*: it is sufficient if the content of the terms is ascertainable, in which case extrinsic evidence is admitted for the purpose of conclusive identification.⁵⁹ In *African Lumber Co (Pvt) Ltd v Katz*,⁶⁰ the court pointed out that the language of a contract must of necessity be applied to physical facts and that this makes recourse to extrinsic evidence unavoidable.⁶¹ It referred with approval to a statement made by Van den Heever J in *Oberholzer v Gabriel*⁶² that

“there are two notions we should not confuse, namely the sufficiency of a demonstration of the subject-matter on the one hand and its application to physical phenomena on the other. There never has been and there cannot be a rule to exclude parol evidence on the latter.”⁶³

⁵⁶ See eg *Le Riche v Hamman* 1946 AD 648 651 read with 653; *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 3 SA 986 (SCA) para 14.

⁵⁷ *Intercontinental Exports (Pty) Ltd v Fowles* 1999 2 All SA 304 (A) para 20; *Republican Press (Pty) Ltd v Martin Murray Associates CC* 1996 2 SA 246 (N) 251F-G.

⁵⁸ See chs 2 (2 4 4) and 3 (3 3 2 1).

⁵⁹ This point is made in numerous cases on suretyships and sales of land. See eg *Credit Guarantee Insurance Corporation of South Africa Ltd v Schreiber* 1987 3 SA 523 (W) 524G-I; *Heathcote v Finwood Papers (Pty) Ltd* 1997 2 All SA (E) 39; *Industrial Development Corporation of SA (Pty) Ltd v Silver* 2003 1 SA 365 (SCA) para 9; *Sapirstein v Anglo African Shipping Co (SA) Ltd* 1978 4 SA 1 (A) 12B-D; *Le Riche v Hamman* 1946 AD 648 653; *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 1 SA 983 (A) 990; *Coronel v Kaufman* 1920 TPD 207 209.

⁶⁰ 1978 4 SA 432 (C) 435B.

⁶¹ See also *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 1 SA 983 (A) 990 in which Watermeyer CJ pointed out that

“[a] contract of sale of land in writing is in itself a mere abstraction, it consists of ideas expressed in words, but the relationship of those ideas to the concrete things which the ideas represent cannot be understood without evidence.”

⁶² 1946 OPD 56.

⁶³ 59.

Where the evidence is adduced to link the actual party or the actual subject-matter of the transaction to the description in the contract, such evidence is not objectionable. It cannot contravene the parol evidence rule because such evidence neither varies, nor contradicts, nor supplements the terms of the agreement as these have been reduced to writing – it only gives meaning to the terms.⁶⁴ Furthermore, provided the terms of the contract are sufficiently described, the admission of such evidence cannot lead to fraud or perjury (and therefore formalities legislation is not contravened).

A case which illustrates the interaction between the parol evidence rule and formalities particularly well is *Sapirstein v Anglo African Shipping Co (SA) Ltd*,⁶⁵ which dealt with the validity of a suretyship in which seven parties (called promissors) were identified as potential debtors or potential sureties, depending on subsequent events. If any of the seven incurred a debt (to one of a group of stipulated creditors), the other promissors would automatically become liable to the creditor as sureties for that debt.⁶⁶

The court pointed out that where a suretyship agreement is concluded for a future debt, extrinsic evidence must necessarily be admitted to prove that the principal obligation has since come into existence and, where the suretyship is an unlimited continuing suretyship, to establish the amount of the principal debt.⁶⁷ Furthermore, the admission of evidence to indicate which of the promissors (who had, until that point, merely been potential debtors or potential sureties) had become indebted to which of the creditors did not amount to the admission of evidence concerning the consensus between the sureties and creditors. Until the debt had been incurred, the relevant promisor was merely a potential surety; once the debt was incurred, the relevant promisor ceased to be potential surety and became a principal debtor. Any evidence of the agreement creating the debt was evidence relating to the agreement between the creditor and principal debtor, and not between the creditor and sureties.⁶⁸

⁶⁴ The admission of extrinsic evidence of an identificatory nature is in fact merely the application of the terms of the contract to the facts of the case (A J Kerr *The Law of Sale and Lease* 3 ed (2004) 92; *Delmas Milling Co Ltd v Du Plessis* 1955 3 SA 447 (A) 454F).

⁶⁵ 1978 4 SA 1 (A).

⁶⁶ 12E-G.

⁶⁷ 12A.

⁶⁸ 12G.

This decision circumvents neither the parol evidence rule nor the functions of formalities. The parol evidence rule merely excludes evidence of prior and contemporaneous agreements and not evidence of subsequent transactions.⁶⁹ While formalities legislation has been interpreted as prohibiting subsequent oral variations of the written agreement,⁷⁰ the subsequent transaction in this case was an agreement creating the principal debt which the suretyship was intended to cover. Evidence thereof did not vary the suretyship; it merely assisted the court in the application of its terms. Furthermore, those terms which related to the potential debtors/potential sureties were sufficiently ascertainable because the identities of the promissors were listed in the suretyship agreement;⁷¹ extrinsic evidence was only necessary to identify who in that list had become the debtor and who the sureties.

Although extrinsic evidence may be admitted for the purposes of final identification, its admission is contingent upon the adequacy of the description of the terms in the contract.⁷² Where there is no description at all, or an inadequate description, the extrinsic evidence ceases to serve an identificatory purpose and amounts to an attempt to supplement the terms of the written contract. This simultaneously opens the door to uncertainty, fraud or perjury.

For example, in *Wallace v 1662 G&D Property Investments CC*,⁷³ two deeds of suretyship failed to identify the principal debtor by name, but simply referred to him as “the debtor”.⁷⁴ When asked by the court what extrinsic evidence he would seek to lead to identify the debtor, plaintiff’s counsel replied that he would ask who the debtor was to which the suretyship agreements referred.⁷⁵ According to the court, this type of evidence was excluded both by the objects of the General Law Amendment Act and by the parol evidence rule. With regard to the former, it would create significant potential for fraud and perjury, thereby subverting the underlying policy of the Act.⁷⁶ The latter rule precluded the

⁶⁹ *Wallace v 1662 G&D Property Investments CC* 2008 1 SA 300 (W) para 18.

⁷⁰ See 4 3 5 below.

⁷¹ *Sapirstein v Anglo African Shipping Co (SA) Ltd* 1978 4 SA 1 (A) 10B.

⁷² *African Lumber Co (Pvt) v Katz* 1978 4 SA 432 (C) 435C-D.

⁷³ 2008 1 SA 300 (W).

⁷⁴ Para 6.

⁷⁵ Para 19.

⁷⁶ *Wallace v 1662 G&D Property Investments CC* 2008 1 SA 300 (W) paras 20-22. The absence of a closed list of potential debtors like the one contained in the suretyship in *Sapirstein v Anglo African Shipping Co*

leading of such evidence because it would amount to evidence of the negotiations between the parties and their consensus in that it would reveal what the parties had in mind when they referred to “the debtor” in the documents.⁷⁷

4 3 2 Blank spaces

In the previous chapter,⁷⁸ reference was made to cases in which parties who were required to sign the written agreement had done so while the document still contained blank spaces. It was stated there that the question whether the document nevertheless constituted a complete recordal could often be solved upon a construction of the document itself, without recourse to extrinsic evidence. However, where the document contains conflicting *indicia* as to whether the term containing the blank space was intended to be part of the written agreement, extrinsic evidence is admissible to determine why there are blank spaces in the agreement.⁷⁹ According to the case law, there are at least three possible reasons for the existence of such blank spaces.⁸⁰ First, the parties did not intend the clause to form part of their contract. Secondly, the parties intended the clause to form part of their contract but, at the time the contract was signed, had not yet agreed on the content of the clause. Finally, the parties intended the clause to form part of their contract and agreed upon its content, but simply omitted to fill in the blank spaces for some reason.

Where the parties did not intend the clause to form part of their contract, the court will regard the clause containing the blank space as *pro non scripto* and, provided the contract still contains all the material terms of the agreement (including the *essentialia*), enforce it.⁸¹ If, however, the extrinsic evidence proves the second or third possibility above, the

(SA) *Ltd* 1978 4 SA 1 (A), created the possibility that evidence could be led to indicate that “the debtor” meant an unlimited number of debtors.

⁷⁷ *Wallace v 1662 G&D Property Investments CC* 2008 1 SA 300 (W) para 21. It is permissible however, to identify the seller in a written sale of land as the “owner”, because extrinsic evidence to establish his identity would not relate to the parties’ negotiations or consensus – see ch 3 (3 3 2 1).

⁷⁸ See ch 3 (3 4 3).

⁷⁹ *Johnston v Leal* 1980 3 SA 927 (A) 941D-H; *Nedbank Ltd v Wizard Holdings (Pty) Ltd* 2010 5 SA 523 (GSJ) para 25.

⁸⁰ *Johnston v Leal* 1980 3 SA 927 (A) 940B-C. See also *Heathcote v Finwood Papers (Pty) Ltd* 1997 2 All SA 28 (E) 32.

⁸¹ 940D.

agreement will be void, either because the writing does not constitute a valid enforceable contract or because it failed to record the parties' whole agreement in writing.⁸²

4 3 3 Conditions and tacit terms

As a general rule, evidence that the written agreement is subject to an oral suspensive condition is admissible while evidence of a resolute condition is precluded. According to Christie, "it is difficult to see how evidence of a resolute condition could ever be given without contradicting or varying the terms of the written document."⁸³ This opinion has recently been confirmed in *Sealed Africa (Pty) Ltd v Kelly*⁸⁴ where the court refused to admit evidence of a resolute condition which would have had the effect of discharging a loan agreement which, *ex facie* the document recording the agreement, appeared to be fully operative.⁸⁵

In the case of evidence relating to an oral suspensive condition however, it is often stated that extrinsic evidence of such a suspensive condition is admissible because it does not vary the terms of a contract.⁸⁶ For example, in *Stiglingh v Theron*⁸⁷ the court held the following:

"[E]vidence is admissible of a separate oral agreement constituting a condition precedent to the attachment of any liability under the written instrument. This is an exception to the general principle, more apparent than real, because such evidence does not essentially tend to vary the document. Accepting its terms as they stand, it aims at suspending its operation ... [In] *Wallis v Littell* (31 L.J. C P. 100) ... what we should call a written assignment of lease was sued upon. Evidence was tendered to the effect that the whole arrangement was to be suspended pending the consent of the ground landlord, and that until he gave his consent no obligation was to arise under the document. The court admitted the evidence and upheld the contention."⁸⁸

⁸² 940E-F.

⁸³ *The Law of Contract in South Africa* (2001) 4 ed 224.

⁸⁴ 2006 3 SA 65 (W).

⁸⁵ Para 20.

⁸⁶ See *Stiglingh v Theron* 1907 TS 998; *Aymard v Webster* 1910 TPD 123 129; *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 47.

⁸⁷ 1907 TS 998.

⁸⁸ 1003.

It is argued that a close examination of this quotation reveals two possible consequences of a suspensive condition. The first is that a suspensive condition suspends, in whole or in part, the operation of the obligations arising from the contract. This has also come to be the generally accepted definition of a suspensive condition in South African law.⁸⁹ The second view of a suspensive condition is that it suspends the coming into existence of a contract, rather than simply suspending its enforceability. On such a view, extrinsic evidence of an oral suspensive condition would not be excluded by the parol evidence rule, because its admission would not vary the terms of the “contract”, but go towards showing that no contract existed, unless and until the suspensive condition was fulfilled.⁹⁰ This exception to the parol evidence rule can be traced to the English case of *Pym v Campbell*⁹¹ and the concept of a “condition precedent”, which “strips a written deed of its

⁸⁹ *Tuckers Land & Development Corporation (Pty) Ltd v Strydom* 1984 1 SA 1 (A) 10D-E per Van Heerden JA; *Odendaalsrust Municipality v New Nigel Estate Goldmining Co Ltd* 1948 2 SA 656 (O) 666-667; *First National Bank of SA Ltd v Lynn NO* 1996 2 SA 339 (A) 335E-G; D P De Villiers “Die Betekenis van die Opskortende Voorwaarde by ‘n Ooreenkoms I” (1943) 7 *THRHR* 13 21; Van der Merwe et al *Contract* 251. The one exception to this generally accepted definition of a suspensive condition can be found in a long line of cases dealing with contracts of sale, which appear to favour the definition of a suspensive condition as suspending the existence of the contract until it becomes apparent that the condition is fulfilled (some of the cases adopting this approach are discussed in detail in *Geue v Van der Lith* 2004 3 SA 333 (SCA) paras 7-13). In *Quirk’s Trustees v Assignees of Liddle and Co* (1884-1885) 3 SC 322 (“*Quirk*”), De Villiers CJ relied on *D 18 1 80 3* and *Voet 18 1 26* to come to the conclusion that a contract of sale which contained a term suspending the transfer of ownership did not come into existence until the “condition” was fulfilled (326). However both *Voet* and the relevant *Digest* excerpt deal with the fact that a term which provides that ownership will never pass to the buyer is inconsistent with the essence of a contract of sale. These sources do not provide support for the notion that a suspensive condition, attached to a contract of sale, prevents the coming into existence of the contract itself (see De Villiers 1943 *THRHR* 18-19); *Tuckers Land & Development Corporation (Pty) Ltd v Strydom* 1984 1 SA 1 (A) 11G-12A). Nevertheless, the view adopted in *Quirk* as to the effect of a suspensive condition in a contract of sale has been followed (and never overturned) in a number of subsequent cases: see eg *Massey-Harris Co (SA) Ltd v Van der Walt* 1932 EDL 115; *South African Land & Exploration Co Ltd v Union Government* 1936 TPD 174; *Corondimas v Badat* 1946 AD 548; *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 2 SA 872 (A); *Soja (Pty) Ltd v Tuckers Land & Development Corporation (Pty) Ltd* 1981 3 SA 314 (A). The effect of these cases on alienations of land has since been nullified, because the Alienation of Land Act provides that “to alienate” means to “sell, exchange or donate, irrespective of whether such sale, exchange or donation is subject to a suspensive or resolutive condition” (s 1). The exception to the parol evidence rule, discussed in the main text above, remains.

⁹⁰ See M Mendelowitz “The ‘Parol Evidence Rule’ and Suspensive Conditions in Contracts” (1978) 75 *SALJ* 32 33-34; Van der Merwe et al *Contract* 152.

⁹¹ (1856) 6 E & B 370.

contractual effect until that condition has been fulfilled.”⁹² In the above quotation, it is apparent that the court transposes the exception relating to “conditions precedent” to suspensive conditions as these are understood in the South African sense. While it is possible that parties may have intended a particular suspensive condition to have the same effect as a condition precedent,⁹³ it is simply not true, as a general rule, that extrinsic evidence of a suspensive condition will never vary the terms of a written contract.⁹⁴ This point is illustrated in *Thiart v Kraukamp*⁹⁵ (“*Thiart*”).

On 14 September 1966, the parties had concluded a written agreement for the sale of land. Subsequently, the applicant sought to cancel the sale on the basis of alleged breach of contract on the respondent’s part.⁹⁶ The respondent in turn alleged that the agreement was subject to an oral suspensive condition to the effect that he would acquire a loan within 120 days in order to finance the sale. This loan was not awarded and the respondent argued that the agreement had lapsed as a result.⁹⁷ He alleged further that evidence of this oral suspensive condition was admissible because it did not contravene the parol evidence rule.

Trengove J held that one must distinguish between the situation where the parties intended to suspend the coming into existence of the contract itself until the happening of an uncertain future event, and one where the parties intended the contract to come into existence immediately, but merely to suspend its operation.⁹⁸ The effect which the parol evidence rule has on the admission of evidence relating to the suspensive condition is the following:

⁹² See *Thiart v Kraukamp* 1967 3 SA 219 (T) 225F-226D; D T Zeffertt, A P Paizes & A St Q Skeen *The South African Law of Evidence (formerly Hoffmann and Zeffertt)* (2003) 336. See also D Hochberg “Exclusion of Extrinsic Evidence In Substitution Of, To Contradict, or Add To Documents” in H M Malek (ed) *Phipson on Evidence* 16 ed (2005) 1238 1263.

⁹³ Zeffertt et al *The South African Law of Evidence* 337; Mendelowitz 1978 SALJ 47.

⁹⁴ In *Philmatt (Pty) Ltd v Mosselbank Developments* CC 1996 2 SA 15 (A) 23E-F, the exception was confirmed, although the court acknowledged that “[i]t remains problematical ... to determine in what circumstances this exception to the parol evidence rule would apply, and when extrinsic evidence of a suspensive condition would be admissible”. See also Van der Merwe et al *Contract* 151-152; Zeffertt et al *The South African Law of Evidence* 336.

⁹⁵ 1967 3 SA 219 (T).

⁹⁶ 222B-D.

⁹⁷ 222E-H.

⁹⁸ 225E-F.

“[In die eerste geval is] [d]ie getuienis ... altyd toelaatbaar om te bewys dat wat *prima facie* voorkom as ‘n skriftelike ooreenkoms, inderdaad geen skriftelike ooreenkoms is nie, omdat die partye om een of ander rede vooraf ooreengekom het dat die skriftelike stuk geen werking hoegenaamd as ‘n kontrak tussen hulle sal hê nie. Dit is na my mening heeltemal ‘n ander geval waar die partye ‘n skriftelike kontrak aangaan wat op die oog onvoorwaardelik is en dit dan wil omskep in ‘n voorwaardelike kontrak op grond van ‘n voorafgaande mondelinge ooreenkoms ... [B]ewys van die mondelinge ooreenkoms waarvolgens die onvoorwaardelike kontrak omskep word in ‘n voorwaardelike kontrak, bots na my mening met die inhoud van die skriftelike kontrak.”⁹⁹

The contract included terms which stated that the respondent had to pay a part of the purchase price within fourteen days of contract conclusion; that the failure to do so would entitle the applicant to sue for the amount; and a term stating that the respondent would get occupation of the property in the beginning of October.¹⁰⁰ None of the obligations created by these terms appeared to be conditional upon the respondent receiving a loan within 120 days (ie that the obligations would only arise and become enforceable if the loan was received) and thus, evidence of such an oral condition would be contrary to what appeared *ex facie* the written contract.¹⁰¹

It is a different matter if there are terms in the contract which are consistent with the existence of a tacit suspensive condition. In *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd*¹⁰² (“*Stalwo*”) the court held that the description of land to be sold as “plots 5, 6, 7, & 8 of [a] proposed subdivision” indicated that it was a tacit term of the agreement that it would be conditional upon a successful application for subdivision.¹⁰³ As such, the suspensive condition automatically formed part of the written agreement.

⁹⁹ 226C-E.

¹⁰⁰ 226F-H.

¹⁰¹ See also *Mutual Construction Company v Victor* 2002 3 All SA 807 (W) para 15. The fact that a suspensive condition can constitute a variation of terms also underlies the judgment of Tshiqi AJA in *Rockbreakers and Parts (Pty) Ltd v Rolag Trading (Pty) Ltd* 2010 2 SA 400 (SCA) in which an offer to purchase, with the addition of a manuscript insertion that the sale would be subject to successful subdivision, was signed by the respondent as purchaser. Tshiqi AJA concluded that in the circumstances, the manuscript insertion constituted a material alteration of the proposed contractual terms and therefore amounted to a counter-offer which was not accepted in writing by the seller (para 8).

¹⁰² 2008 1 SA 654 (SCA).

¹⁰³ Paras 11-12.

This decision accords with the general South African approach to the admissibility of extrinsic evidence to prove the existence of a tacit term in an agreement subject to formalities. For example, in *Wilkens NO v Voges*,¹⁰⁴ Nienaber JA held that

“a tacit term, once found to exist, is simply read or blended into the contract. Not being an adjunct to but an integrated part of the contract, a tacit term does not [contravene statutory formalities].”¹⁰⁵

When viewed in a broader context, the South African approach appears somewhat illogical. It admits evidence which is traditionally excluded by both the parol evidence rule and statutory formalities¹⁰⁶ to prove that there is a tacit term based on the parties' unexpressed consensus or an imputed consensus¹⁰⁷ but as we shall see below,¹⁰⁸ it will exclude such evidence when a party seeks to prove the existence of an oral material term which is based on the parties' actual consensus. This leads to the peculiar situation that a party who wishes to convince the court of the existence of a tacit term, despite the lack of an articulated consensus, is in a better position than a party who can prove that there was actual consensus regarding such a term. Furthermore, while a court will not easily conclude that there is in fact a tacit term in an agreement,¹⁰⁹ thereby minimising the chance that it will be swayed by fabricated evidence, it is not immediately apparent why the same caution cannot be exercised when a party alleges that an oral term has been omitted from a written agreement. Instead, such a party has to claim that the contract

¹⁰⁴ 1994 3 SA 130 (A).

¹⁰⁵ 144C-D.

¹⁰⁶ Maxwell “Interpretation of Contracts” in *The Law of Contract in South Africa* 262-263.

¹⁰⁷ These are the two alternative bases upon which a tacit term can be based:

“A tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such a matter if only they had thought about it - which they did not do because they overlooked a present fact or failed to anticipate a future one.” (*Wilkens NO v Voges* 1994 3 SA 130 (A) 136H-I).

¹⁰⁸ See 4 3 4.

¹⁰⁹ In *Wilkens NO v Voges* 1994 3 SA 130 (A) 136H it was stated that a tacit term must be “self-evident”; a similar sentiment is evident in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) 532G-533A. More recently, in *Rockbreakers and Parts (Pty) Ltd v Rolag Trading (Pty) Ltd* 2010 2 SA 400 (SCA) para 23, Wallis AJA stated that

“a tacit term is not lightly to be imputed to parties who have chosen to embody their agreement in writing. The reason is that one infers, from the fact that they have chosen to adopt that course, that they have thought about its terms, and the document reflects those terms.”

should be rectified if he wants that oral term to be enforced. This seems unnecessarily complicated. It is for this reason alone that the *Stalwo* decision is supported: the court erred in concluding that there was a tacit suspensive condition in the agreement by basing it on the parties actual expressed consensus,¹¹⁰ but at least it avoided the circuitous procedure which must be adopted if a party wants a court to enforce a term which the parties actually agreed upon but omitted to include in their written agreement.¹¹¹

Returning to the more specific topic of suspensive conditions it is also possible, according to *Philmatt (Pty) Ltd v Mosselbank Developments CC*¹¹² ("*Philmatt*"), to bring evidence of an oral suspensive condition when the purpose is not to vary or contradict the contract, but to prove that it is formally invalid.

Here the respondent bought a property ("the Paternoster property") with the purpose of developing a township comprising 72 erven. It concluded a sale agreement in terms of which the respondent agreed to sell 23 erven for R18 639 per erf (the amount was said to be the cost price of an erf¹¹³) to Wale Street or its nominee.¹¹⁴ A finance agreement was also concluded, which obliged Wale Street to acquire financing for the purchase price of the entire Paternoster property, as well as the costs of developing the township. Although Wale Street did receive some financing, it was not for the full amount.¹¹⁵ Finally, a nomination agreement was concluded, nominating the appellant as purchaser.¹¹⁶ The appellant sought transfer of the erven and it was common cause that if the respondent was required to transfer the erven at the price indicated in the sale agreement, the consequence would be its insolvency.¹¹⁷

As a result, the respondent sought to prevent transfer of the erven. In the court *a quo* it relied on two grounds. The first was that the sale agreement should be rectified so as to

¹¹⁰ *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 1 SA 654 (SCA) paras 5, 11. For criticism of this aspect of the case, see R Sharrock "Contract" (January to March 2008) *JQR* para 2.4.1 <<http://ipproducts.jutalaw.co.za.ez.sun.ac.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu>> (accessed 05-11-2012).

¹¹¹ See ch 5.

¹¹² 1996 2 SA 15 (A).

¹¹³ 20F-G.

¹¹⁴ 19l.

¹¹⁵ 20A-C.

¹¹⁶ 20C-D.

¹¹⁷ 20F-G.

relieve the respondent from the duty to transfer. This argument was rejected on the basis that rectification cannot be awarded against an innocent third party like the appellant.¹¹⁸ The second argument, and this was also the basis for the appeal, was that the sale agreement did not comply with statutory formalities because it failed to include all the material terms of the parties' agreement in writing. The alleged material term was an oral suspensive condition that the sale agreement would be subject to the acquisition of financing by Wale Street for the entire project (ie the purchase price of the Paternoster property and development costs of the proposed township).¹¹⁹ The failure to include this suspensive condition, according to the respondent, rendered the sale agreement void.

The appellant argued first, that evidence of such a suspensive condition would be contrary to the parol evidence rule.¹²⁰ The court confirmed the general rule as stated in *Stiglingh v Theron*¹²¹ above, that admission of extrinsic evidence regarding a suspensive condition is allowed, but acknowledged that the circumstances in which this exception is applicable remain difficult to determine.¹²² Therefore it sought to show that extrinsic evidence of this condition was admissible on another basis, namely that

“[t]he object of the respondent in seeking to adduce this extrinsic evidence was not to incorporate the suspensive condition as a term of the deed of sale, and then to enforce such term by relying on Wale Street's failure to comply with the suspensive condition. Nor did the respondent seek to contradict, alter, add to or vary the terms of the deed of sale as such. The respondent merely wished to introduce the extrinsic evidence in order to establish the existence of a material oral term which was not incorporated in the deed of sale, and to show that the deed of sale therefore did not constitute a valid and enforceable deed of alienation in terms of s 2(1) of the [Alienation of Land] Act.”¹²³

¹¹⁸ *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 2 SA 15 (A) 20I-21A. See eg D J Joubert “Rektifikasie en die Belange Van Derdes” (1983) 46 *THRHR* 326; B R Bamford “Rectification in Contract” (1963) 80 *SALJ* 528 537

¹¹⁹ *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 2 SA 15 (A) 21G-I.

¹²⁰ 22I.

¹²¹ 1907 TS 998.

¹²² *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 2 SA 15 (A) 22I-23G.

¹²³ *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 2 SA 15 (A) 23G-H. See also Kerr *The Law of Contract* 6 ed (2002) 350-351, who agrees with the court's justification for the admission of extrinsic evidence in this context.

The court found support for its conclusion that extrinsic evidence to prove the formal invalidity of the agreement of sale was admissible in *Johnston*, where Corbett JA, quoting from Hoffmann's *South African Law of Evidence*,¹²⁴ held that

“[t]he fact that a transaction has been embodied in a document does not preclude a party from attacking its validity. For example, evidence may be adduced to prove that it was induced by fraud, duress or misrepresentation, or that it is void for mistake, illegality or failure to comply with the terms of a statute.”¹²⁵

Hoffmann, in turn, relied on a similar statement in *Cross on Evidence*,¹²⁶ in which the case of *Campbell Discount Co Ltd v Gall*¹²⁷ (“*Campbell*”) is cited as support for the fact that extrinsic evidence is always admissible to prove that a written agreement does not comply with statutory formalities.

However, it is debatable whether this case in fact supports such a proposition. There, the defendant bought a second-hand car from B for £265 in terms of a hire-purchase agreement. He paid £65 as a deposit and agreed to pay the rest of the purchase price in weekly instalments of a certain amount, over a period of 18-24 months. He signed a blank hire-purchase agreement provided by the plaintiff, leaving the blanks to be filled in by B. B inserted a false purchase price (with the effect that the agreement fell outside the ambit of the Hire-Purchase Act 1938) and changed the amount of the instalments as well as the period over which they would be paid. The plaintiff company, which was unaware of the fact that the terms of the oral agreement had been changed, subsequently sought to claim in terms of the written agreement.¹²⁸

The defendant argued that first, no agreement had ever been concluded between himself and the plaintiff and secondly, even if there was an agreement, it was unenforceable because it failed to comply with statutory formalities.¹²⁹ It was argued on appeal that parol

¹²⁴ 2 ed (1970) 215.

¹²⁵ *Johnston v Leal* 1980 3 SA 927 (A) 945G. This statement is repeated in Zefferdt et al *The South African Law of Evidence* 327-328.

¹²⁶ R Cross, J A Gobbo, D Byrne & J D Heydon *Cross on Evidence* 4 ed (1980) 536. The statement is repeated in C Tapper *Cross & Tapper on Evidence* 10 ed (2004) 720.

¹²⁷ [1961] 1 QB 431.

¹²⁸ 433.

¹²⁹ 438.

evidence was inadmissible to show that the parties had agreed to something other than that which appeared in the written document.¹³⁰ Holroyd Pearce LJ responded as follows:

“The Hire-Purchase Act ... cannot in my judgment be excluded by documents which, though purporting to be outside the Act, represent a transaction which is in truth within it ... [P]arol evidence has always been admissible to show the true nature of a written transaction which appears to satisfy or exclude the Act although that evidence varies or contradicts the documents. Such evidence is admissible here for the purpose of showing that the true bargain was within the Hire-Purchase Act (although the written document is outside it).”¹³¹

From this quotation, it appears that the judge was allowing extrinsic evidence to show the true nature of the agreement – it was mere coincidence that this “true bargain” happened to fall within the ambit of the Hire-Purchase Act 1938 and was therefore subject to certain statutory formalities. In other words, the purpose of the extrinsic evidence was not to show that the agreement was unenforceable, but that the defendant had intended to agree to different terms. That this is the actual basis of the judge’s decision is also evident from other statements made in the judgment.¹³² For example, he states that

“the defendant is not bound by the purported hire-purchase agreement. It was not the contract that he made”¹³³

and

“[the plaintiff company] ... believed that [the document] was a genuine document. They did not know the defendant's signature or anything about the defendant, save what the document told them.”¹³⁴

This suggests that the true *ratio* of the decision is the lack of consensus between the parties and that extrinsic evidence was admissible, not to prove non-compliance with statutory formalities, but to show that the defendant had intended something different to that which appeared in the written document. The plaintiff, of course, accepted the terms as they appeared on the document. There could not have been consensus between the

¹³⁰ 439.

¹³¹ 439.

¹³² As for the role of B: the court found that he was neither the agent of the plaintiff (441), nor that of the defendant (442).

¹³³ 443.

¹³⁴ 442.

parties: a clear statement to this effect appears in Harman LJ's judgment, where he stated that "there never was any consensus, and nothing on which the plaintiff company could sue."¹³⁵

If this is the correct interpretation of the *Campbell* case, then it does not provide support for the general statement that extrinsic evidence is always permissible to prove that an agreement does not comply with the terms of a statute. Rather, the *Campbell* case simply reiterates two exceptions to the parol evidence rule: the first is that it is always permissible to bring evidence relating to the absence of consensus between the parties and the second, that it is always permissible to introduce extrinsic evidence to show the true nature of the parties' agreement.¹³⁶ The facts of the *Philmatt* case do not square neatly with either of these exceptions – there was consensus, and the true nature of the agreement was not in dispute. Indeed, it is arguable that the only way in which evidence of the oral suspensive condition could have been introduced in *Philmatt*, was on the basis of the definition of a suspensive condition as suspending the existence of the contract, rather than its operation.

However, on the assumption that Hoffman's interpretation of the *Campbell* case is sound and that the court in *Philmatt* was correct in holding that the parol evidence rule does not exclude evidence of the oral suspensive condition, the question remains whether the fact that the parties' agreement was subject to statutory formalities precluded evidence of the suspensive condition. This will be considered in the next section.

4 3 4 Validity

Prior to discussing the admission of extrinsic evidence to determine the validity of an agreement, it is necessary to distinguish between formal and substantive invalidity. Formal invalidity relates to defects in the form of the transaction, for example the name of

¹³⁵ 444.

¹³⁶ See eg *Moodley v Moodley* 1991 1 SA 358 (N). See also *Beaton v Baldachin Bros* 1920 AD 312 315, in which Innes CJ stated that

"[t]he general rule is clear: a party to a written agreement cannot vary its terms by parol evidence. But a party to such a writing which is sought to sue against him, may lead evidence to show that the document in question is not a contract at all, that it was not intended by its signatories to operate as such, but was given for another purpose. And when he has thus got rid of the writing, he may, if he can, establish another verbal contract as the true agreement."

the surety has been omitted from the written agreement, or the deed of alienation fails to provide an adequate description of the land to be sold. Substantive invalidity relates to the failure to comply with other requirements for contractual validity, like legality, possibility and certainty of performance.¹³⁷

Extrinsic evidence is always admissible to prove that the contract is substantively void, voidable or a simulation.¹³⁸ Evidence may be adduced to prove that the contract was induced by fraud, duress or misrepresentation or that it is void as a result of mistake, for example. These instances do not amount to true exceptions to the parol evidence rule (or at least that part of it known as the integration rule) because such evidence relates to whether there was consensus between the parties and not to the terms of the contract.

Whether extrinsic evidence is admissible to prove that the agreement is formally invalid is a more complex issue. As stated in the previous chapter, South African courts have held that legislation imposing statutory formalities requires that all the material terms of the parties' agreement must be reduced to writing.¹³⁹ This raises the following question: is it permissible for a party to produce extrinsic evidence of an oral material term (which is not an essential term of the relevant agreement) upon which the parties have agreed, but which has not been reduced to writing, in order to show that the agreement is formally invalid?

The answer to this question appears to depend on whether the omission of the material term is evident *ex facie* the document recording the agreement. For instance, where there is a blank space relating to what would be a material term, extrinsic evidence is always permissible to determine why the parties omitted to complete it, where reading the document as a whole has not provided an answer.¹⁴⁰ However, where the omission of the

¹³⁷ Van der Merwe et al *Contract* 157-158.

¹³⁸ Burger 1996 *TM* 145; S Cornelius "Die Toelaatbaarheid van Ekstrinsieke Getuienis by die Uitleg van Geskrewe Kontrakte" 2001 *TSAR* 415 426; *Johnston v Leal* 1980 3 SA 927 (A) 945G-E.

¹³⁹ Ch 3 (3 2 2).

¹⁴⁰ *Heathcote v Finwood Papers (Pty) Ltd* 1997 2 All SA 28 (E) 32-33; *Johnston v Leal* 1980 3 SA 927 (A) 947A-C, in which it is stated that in this type of situation

"the Court is concerned with a document which on the face of it is incomplete and this raises a number of possible factual inferences, one of which leads to the validity of the contract, others to its invalidity. The writing already contains uncertainty as to its contents and the seeds of dispute between the parties.

material term is not evident *ex facie* the document, so that the document itself appears to record a formally valid agreement, the traditional approach did not permit evidence of the omitted term in order to prove that the written agreement was formally invalid.

The relationship between the omission of material terms, formal validity and extrinsic evidence is illustrated in *Standard Bank of South Africa Ltd v Cohen (1)*¹⁴¹ (“*Cohen (1)*”). Here, the surety alleged that the two suretyship agreements which he had signed were formally invalid, because they failed to record two material terms which the parties had agreed upon – first, that the plaintiff would not advance credit to the principal debtor in excess of the amount guaranteed by the defendant and secondly, that no credit would be advanced until the debtor had ceded its book debts to the plaintiff as security.¹⁴² However, the suretyship agreements themselves did not appear to be incomplete;¹⁴³ furthermore, they both contained merger clauses as well as certificates of completion.¹⁴⁴

The court set out two reasons for its decision not to admit evidence regarding the material terms. The first was that the parties intended the written agreements to act as integrations, which the court inferred from the presence of the certificates of completion and merger clauses.¹⁴⁵ Thus, to admit evidence of the material terms would not only contradict these terms,¹⁴⁶ but would also supplement the written agreements with terms of a prior oral agreement.¹⁴⁷

The second reason was that to admit evidence of the omitted material terms would be contrary to the functions of formalities:

“[O]ne of the objects of the requirement of writing is to achieve certainty as to the true terms agreed upon by the parties, [and] this object will certainly be defeated if the parties are allowed to have an otherwise valid document invalidated by proof that there are other terms which have

Extrinsic evidence to resolve the problem and to determine the issue of validity would thus ... not be inconsistent with the policy of the Act.”

¹⁴¹ 1993 3 SA 846 (SE).

¹⁴² 847F.

¹⁴³ 848I.

¹⁴⁴ 848A-D.

¹⁴⁵ 850B-D.

¹⁴⁶ 850D.

¹⁴⁷ 850H.

been agreed upon prior to or contemporaneous with the written contract. Such a course would open the door to all the mischief which the Legislature sought to prevent.”¹⁴⁸

De Wet and Van Wyk make a similar argument, although they are not referred to in the *Cohen (1)* judgment.¹⁴⁹ They state that

“[i]n ons regspraak word soms vertel dat die kontrak in sy geheel op skrif moet wees. Dit is ‘n misleidende manier om die situasie te beskryf. Mits die skriftelike stuk, op ‘n deugdelike interpretasie daarvan, ‘n [kontrak] weerspieël, is dit die kontrak wat partye se regte en verpligtings bepaal. Het hulle ander afsprake mondeling gemaak maar nie in die skriftelike stuk opgeneem nie, is daardie afsprake nie deel van die kontrak nie.”¹⁵⁰

It is implicit in this quotation that extrinsic evidence regarding omitted material terms would be inadmissible. This rule is not limited to agreements subject to formalities which contain merger clauses. Also in the absence of such clauses, courts have held in the past that extrinsic evidence is inadmissible to prove that there was an oral material term not contained in the document and that the agreement was invalid for that reason.¹⁵¹ Therefore, the only option available to a party who wishes to have oral material terms taken into account, rather than simply ignored, is to seek rectification of the written document to include them.¹⁵²

This was the traditional approach until it was overruled (at least implicitly) in the *Philmatt* decision. It will be recalled that there, the respondent sought to introduce evidence that the deed of alienation between itself and the appellant was formally invalid because it did not contain an oral suspensive condition. After holding that evidence of such a term did not contravene the parol evidence rule, the court considered whether evidence of such a condition would be contrary to statutory formalities.

¹⁴⁸ 851F-G.

¹⁴⁹ *Die Suid-Afrikaanse Kontraktereg & Handelsreg* 1 5 ed (1992).

¹⁵⁰ 324 n 56.

¹⁵¹ *Kroukamp v Buitendag* 1981 1 SA 606 (W) 609A-B; *Northern Cape Co-Operative Livestock Agency Ltd v John Roderick & Co Ltd* 1965 2 SA 64 (O) 69E-71H.

¹⁵² See *Kroukamp v Buitendag* 1981 1 SA 606 (W) 609H; *Northern Cape Co-Operative Livestock Agency Ltd v John Roderick & Co Ltd* 1965 2 SA 64 (O) 69H-70A; *Standard Bank of South Africa Ltd v Cohen (1)* 1993 3 SA 846 (SE) 853C-D.

As the court pointed out, a suspensive condition is a material term.¹⁵³ Thus, even if evidence of such a term does not contravene the parol evidence rule, it has been held that

“where a contract of sale of land is complete and regular on the face of it, the admission of extrinsic evidence not excluded by the integration rule, eg evidence of an oral consensus providing for a suspensive condition not contained in the writing, would be regarded as being contrary to the section and the Act, even though the evidence were tendered not to contradict or vary the writing but merely in order to show that the writing failed to record the whole agreement of the parties and, therefore, did not comply with the section. Here it might be said that the admission of extrinsic evidence would permit a party to the contract to introduce uncertainty and disputes where, on the face of it, none exists.”¹⁵⁴

It was also for this reason that the court in *Thiart* rejected the evidence of an oral suspensive condition. As a material term of the contract, it should have been reduced to writing in accordance with the relevant statutory formalities. Because this was not the case, it simply was not binding.¹⁵⁵ Although the court did not refer to any authority for this standpoint, it is consistent with the rule that when a material term has not been reduced to writing, and its absence is not evident *ex facie* the contract, it is simply ignored.

It is on this point that the *Philmatt* case differs. At one point the court itself stated that

“[[j]udging only by the terms of the deed of sale, read with the nomination agreement, the respondent appears to be obliged, subject to due performance by the appellant, to transfer the 23 erven into its name.”¹⁵⁶

This implies that there was nothing *ex facie* the written sale agreement which suggested that a material term had been omitted. Nevertheless, the court held that proof of the oral suspensive condition was admissible in order to show that the agreement was formally invalid. It allowed such evidence on the basis that

¹⁵³ *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 2 SA 15 (A) 24F-G. See also *Johnston v Leal* 1980 3 SA 927 (A) 938A; *Van Leeuwen Pipe and Tube (Pty) Ltd v Mulroy* 1985 3 SA 396 (D) 400F-I, cited with approval in *Rockbreakers and Parts (Pty) Ltd v Rolag Property Trading (Pty) Ltd* 2010 2 SA 400 (SCA) para 7.

¹⁵⁴ *Johnston v Leal* 1980 3 SA 927 (A) 946H-947A.

¹⁵⁵ *Thiart v Kraukamp* 1967 3 SA 219 (T) 225D.

¹⁵⁶ *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 2 SA 15 (A) 20G-H.

“[e]xtrinsic evidence to procure rectification of a contract of sale of land, or to prove that the contract is not binding because it was induced by fraud would, for instance, be admissible even though such evidence would introduce uncertainty and disputes ... The respondent tenders the extrinsic evidence for a similar reason and should in my opinion be allowed to do so. It should be pointed out once again that the respondent does not seek to introduce the oral term with a view to contradict, alter, add to or vary the terms of the deed of sale.”¹⁵⁷

It is not entirely clear how the court reconciles the admission of extrinsic evidence for the purposes of proving formal invalidity with instances of rectification or fraudulently induced contracts, unless it seeks to emphasise that what all these instances of admitted extrinsic evidence have in common is the notion that to enforce an agreement which does not accurately reflect one or both parties’ intention promotes unconscionable behaviour. Moreover, while it is true that the respondent did not seek “to contradict, alter, add to or vary the terms of the deed of sale”, the same holds true for the parties in prior cases where the court refused to permit evidence of a material term in order to prove that the agreement was formally invalid. The court in *Philmatt* could not have been unaware of this contradictory precedent,¹⁵⁸ and yet it makes no mention of these cases beyond a passing reference to the *Thiart* case in support of the notion that it is difficult to determine when the parol evidence rule will not preclude evidence of an oral suspensive condition.¹⁵⁹

Furthermore, it is difficult to establish the impact of the *Philmatt* decision on cases dealing with the rectification of agreements subject to formalities. As discussed in the following chapter,¹⁶⁰ the current approach to the rectification of such agreements limits itself to determining formal validity *ex facie* the recordal.¹⁶¹ Any extrinsic evidence (either for or against formal validity) is ignored for the purposes of this determination. Only if the agreement appears to be valid *ex facie* the document, will the court consider the extrinsic evidence in order to determine whether the document should be rectified. It is not entirely clear how this position relates to that set out in the *Philmatt* case.

It is also uncertain to what extent the court was influenced by the fact that the respondent could not claim rectification of the agreement due to the involvement of an innocent third

¹⁵⁷ 25F-G.

¹⁵⁸ See eg the list of cases referred to by counsel (but not cited by the court) which included that of *Standard Bank of SA Ltd v Cohen (1)* 1993 3 SA 846 (SE).

¹⁵⁹ *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 2 SA 15 (A) 23F.

¹⁶⁰ Ch 5 (5 3 2 1 2).

¹⁶¹ See *Intercontinental Exports (Pty) Ltd v Fowles* 1999 2 All SA 304 (A) para 20.

party and by the fact that if the sale agreement were to be enforced, it would result in the respondent's insolvency. Finally, it should be noted that in this case, the respondent's allegation of the existence of an oral suspensive condition was supported to some extent by the existence of the written finance agreement between itself and Wale Street. The possibility of fraud was therefore less than it would have been in the absence of such a written document.

Philmatt illustrates the unhappy marriage between the parol evidence rule, statutory formalities and the need to ensure a just result in the particular circumstances of the case. If the court's interpretation of the exception set out in the *Campbell* case is correct, namely that extrinsic evidence is always permissible to prove the formal invalidity of an agreement, then this conclusion is directly at odds with the rule formulated in the context of agreements subject to formalities, to the effect that extrinsic evidence is not permissible to contradict an agreement which appears to be valid *ex facie* the document. If the court's conclusions on the applicability of the *Campbell* case and the admissibility of evidence relating to material terms in the context of statutory formalities are incorrect, then this would resolve the discrepancy between the parol evidence rule and statutory formalities, but it would place a party like the respondent in an untenable position. It could not seek rectification of the agreement in the circumstances (due to the involvement of an innocent third party) and would inevitably have been declared insolvent. There does not appear to be a solution which reconciles all of these principles, other than the very pragmatic one adopted by the court.

4 3 5 Variations

There is one further instance of inadmissible extrinsic evidence which has not been addressed, namely the possibility of introducing evidence of subsequent oral material variations of the contract. As discussed above, the parol evidence rule itself does not preclude evidence of these variations, but it is a well-settled rule that the existence of statutory formalities does prevent evidence of this nature.¹⁶² Apparently, to allow oral variations in this instance would be contrary to the objects of statutory formalities, because

¹⁶² See 4 2 2 above and also *Johnston v Leal* 1980 3 SA 927 (A) 939G-H; *Neethling v Klopper* 1967 4 SA 459 (A) 465A-B; *Kuper v Bolleurs* 1913 TPD 334; *Da Mata v Otto* NO 1971 1 SA 763 (T) 772B-C (discussed in Kerr *The Law of Contract* 146-146). The same position applies in England: see eg *McCausland v Duncan Lawrie Ltd* [1997] 1 WLR 38 44-45.

it could result in a situation where the parties' actual agreement no longer exists wholly in writing, with the corresponding problem of an increase in uncertainty and disputes.¹⁶³ This does not mean that the rule is not interpreted restrictively, however.

For example, it has been held that a waiver can, in certain instances, circumvent the prohibition against oral variations.¹⁶⁴ The same applies in instances of substituted (full) performance which is different to that stipulated in the contract.¹⁶⁵ Finally, oral cancellation of the contract is also permitted.¹⁶⁶ Underlying all these exceptions is the notion that the terms of the contract and the obligations which they create are not being varied; rather, they are suspended (waiver), terminated or discharged (albeit in some manner not specified in the contract).

De Wet criticises the rule that all material variations of the written agreement must be in writing, because it requires a distinction to be drawn between material and non-material variations.¹⁶⁷ It could also be argued that it operates on the assumption that a variation results in the replacement of the original contract with a new contract (which must be in writing) rather than the replacement of one term for another.¹⁶⁸ Finally, certain exceptions to the rule are difficult to apply.¹⁶⁹

¹⁶³ *Neethling v Kloppe* 1967 4 SA 459 (A) 464F-G per Steyn CJ.

¹⁶⁴ See eg *Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd* 1975 3 SA 273 (T); *Van As v Du Preez* 1981 3 SA 760 (T); *Kovacs Investments 724 (Pty) Ltd v Marais* 2009 6 SA 560 (SCA).

¹⁶⁵ *Van der Walt v Minnaar* 1954 3 SA 932 (O); *Kovacs Investments 724 (Pty) Ltd v Marais* 2009 6 SA 560 (SCA); Kerr *The Law of Contract* 145-146.

¹⁶⁶ *Van der Walt v Minnaar* 1954 3 SA 932 (O); *Neethling v Kloppe* 1967 4 SA 459 (A); *Leyland Finance Co Ltd v Van Rensburg* 1970 4 SA 145 (T); *Visser v Theodore Sassen & Son (Pty) Ltd* 1982 2 SA 320 (C).

¹⁶⁷ De Wet & Van Wyk *Kontraktereg* 1 325.

¹⁶⁸ An example of this type of reasoning can be found in P J Aronstam *The Alienation of Land* (1985) 18. By contrast, the revival of an agreement subject to formalities which has been cancelled or which has lapsed due to the non-fulfilment of a suspensive condition does constitute a new agreement and should, in theory, be required to be in writing (see eg De Wet & Van Wyk *Kontraktereg* 1 325-326; D J Joubert *General Principles of the Law of Contract* (1987) 160 n 66). Nevertheless, SA courts have held that a revival of a lapsed or cancelled agreement may occur informally, unless there is a variation of the terms of the original written contract. See eg *Neethling v Kloppe* 1967 4 SA 459 (A) 465H-466A; *Sewpersadh v Dookie* 2008 4 SA 127 (D) para 32 (overturned on appeal (*Sewpersadh v Dookie* 2009 6 SA 611 (SCA))), but not on this point); *Fairoaks Investment Holdings (Pty) Ltd v Oliver* 2008 4 SA 302 (SCA) para 21 (the revival of an agreement which has lapsed due to non-fulfilment of a suspensive condition, and which contains a term which modifies the original suspensive condition, amounts to a variation of the original contract and must be in writing). For commentary on these cases, see eg C Pretorius "Reliance, Waiver and the Tacit Revival of

Thus far, this chapter has considered the rules relating to the admission of extrinsic evidence in general, and instances of admissible and inadmissible evidence. The following section will consider in greater detail one specific example of the interaction between statutory formalities, the parol evidence rule and the admission of extrinsic evidence, namely incorporation by reference.

4 4 Incorporation by reference

4 4 1 South Africa

Incorporation by reference occurs when one document's terms are supplemented by importing the terms of another.¹⁷⁰ In the context of agreements subject to statutory formalities, it is a recognised means of supplementing the deficiencies in a written agreement which would otherwise be invalid for failure to comply with those formalities. Neither section 6 of the General Law Amendment Act nor section 2 of the Alienation of Land Act prevents the terms of a suretyship or sale of land from appearing in more than one document.¹⁷¹ Thus, where a deed of suretyship or alienation does not identify, for instance, the principal debtor or the purchase price, but refers to another document which does so, that document may be proved in order to complete the suretyship or alienation respectively.

To prevent the circumvention of the objects of formalities and the parol evidence rule, South African courts have determined that before the terms of another document may be

Contracts Governed By the Alienation of Land Act 68 of 1981" (2011) 74 *THRHR* 482; R Sharrock "The General Principles of the Law of Contract" 2008 *ASSAL* 388 409-411.

¹⁶⁹ Eg the difference between a waiver and a variation. As pointed out in Lubbe & Murray *Contract* 191 n 3, "[i]t is difficult to determine how a waiver is to be effected, what may be waived, and the precise effect of the waiver."

¹⁷⁰ *Industrial Development Corporation of SA (Pty) Ltd v Silver* 2003 1 SA 365 (SCA) para 6.

¹⁷¹ For suretyships, see *F J Mitrie (Pty) Ltd v Madgwick* 1979 1 SA 232 (D) 235B-E; *Heathcote v Finwood Papers (Pty) Ltd* 1997 2 All SA 28 (E) 31; *Industrial Development Corporation of SA (Pty) Ltd v Silver* 2003 1 SA 365 (SCA) para 6; *Trust Bank of Africa Ltd v Cotton* 1976 4 SA 325 (N) 329G-H; *Trust Bank van Afrika Bpk v Sullivan* 1979 2 SA 765 (T). Cases supporting this proposition in the context of the sale of land include *Hartland Implemente (Edms) Bpk v Enal Eiendomme BK* 2002 3 SA 653 (NC) 667B-C; *Johnston v Leal* 1980 3 SA 927 (A) 937G-H; *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 1 SA 983 (AD) 990-991; *Coronel v Kaufman* 1920 TPD 207 209. In fact, s 1 of the Alienation of Land Act defines a deed of alienation as "a document or documents under which land is alienated".

incorporated into an agreement, there must be an express reference to the former document in the latter agreement. What constitutes a sufficiently express reference in these circumstances and the extent to which extrinsic evidence may be admitted to complete such a reference, was apparently settled in the Supreme Court of Appeal decision in *Industrial Development Corporation of SA (Pty) Ltd v Silver*.¹⁷² However, in order fully to understand that decision and to place it in context, regard must be had to various decisions which preceded it.¹⁷³

Some of the earliest observations on the nature of the reference required before a document may be incorporated, were made in the context of sales of land. In *Coronel v Kaufman*,¹⁷⁴ (“*Coronel*”) Wessels J stated that

“I will not go so far as to say that the actual [price] must be mentioned in the contract; the doctrine *id certum est quod certum reddi potest*, to my mind may in many cases apply to the sale of land. But it must be clear to what the reference is, and it must not depend upon the oral evidence of the parties. If, for instance, the price had been stated as ‘the price contained in your advertisement in the ‘Farmers’ Weekly,’ so that all that was necessary was to refer to that particular document, ... I think that would be sufficient.”¹⁷⁵

And in the same case, Mason J held that

“the price is certain if it can be ascertained in some certain manner. Accepting that proposition, it seems to me that the reference must be a reference to some other document, which therefore, as a writing, is incorporated by means of that reference. That reference must be such as not only to refer to some other writing but also to refer to that writing with certainty and precision.”¹⁷⁶

Both judges seemed to require that the reference to another document be so specific that it need merely be produced and compared to the reference in the agreement in order to

¹⁷² 2003 1 SA 365 (SCA).

¹⁷³ See also C Lewis “Miscellaneous Contracts (Carriage, Loans, Partnership, Service, Suretyship)” 1979 ASSAL 153 164 ff and J T Pretorius “Gebrekkige Borgaktes: Inlywing By Wyse Van Verwysing” (1982) 45 THRHR 317 for a discussion of the cases preceding *Industrial Development Corporation of SA (Pty) Ltd v Silver* 2003 1 SA 365 (SCA).

¹⁷⁴ 1920 TPD 207.

¹⁷⁵ 209.

¹⁷⁶ 210.

conclude that it is the document sought to be incorporated. However in *Van Wyk v Rottcher's Saw Mills (Pty) Ltd*¹⁷⁷ (“*Van Wyk*”) Watermeyer CJ held as follows:

“It has been suggested that a written contract does not satisfy the provisions of the statute unless the mere reading of the document is sufficient to identify the land sold without invoking the aid of any evidence *dehors* the document, but a moment's reflection and an appreciation of the fact that a written contract is merely an abstraction until it is related, by evidence, to the concrete things in the material world will show at once that [that] suggestion makes [the statute] demand performance of an impossibility.”¹⁷⁸

This implies also that the reference to another document need not be as specific as suggested in *Coronel* before incorporation by reference can occur. In other words, is it possible to complete a reference with extrinsic evidence? The answer to this question sparked a heated debate, this time in the context of suretyship agreements.

In *Trust Bank of Africa Ltd v Cotton*,¹⁷⁹ (“*Cotton*”) a deed of suretyship did not identify the principal debtor, but contained a reference to an acknowledgement of debt which did do so. The deed itself provided that the surety bound himself to pay

“as surety and co-principal debtor in solidum to The Trust Bank of Africa Ltd., its orders or assigns, for the due and proper payment by [blank space] (hereinafter called the debtor) of the amount of R25 029,75 (the principal debt) together with finance charges thereon as set out or to be set out in an acknowledgment of debt signed or to be signed by the debtor in favour of The Trust Bank of Africa Ltd.”¹⁸⁰

The court was required to decide whether the acknowledgement of debt could be read together with the suretyship in order to identify the debtor. As its point of departure, it held that section 6 of the General Law Amendment Act merely required that the terms of the contract must be embodied in a written document signed by the surety or on his behalf. It did not require that all the writing must necessarily be contained in one document.¹⁸¹ Therefore, the principle of incorporation by reference was also applicable to suretyship agreements. Counsel for the surety did not oppose the court's conclusion on this point,

¹⁷⁷ 1948 1 SA 983 (A).

¹⁷⁸ *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 1 SA 983 (A) 990. Referred to with approval by Scott JA in *Industrial Development Corporation of SA (Pty) Ltd v Silver* 2003 1 SA 365 (SCA) para 9.

¹⁷⁹ 1976 4 SA 325 (N).

¹⁸⁰ 327F-G.

¹⁸¹ 329G-H.

but submitted that the document referred to in the suretyship agreement had to be identifiable *ex facie* the agreement itself and that oral evidence was not admissible to identify the second document.¹⁸²

Miller J disagreed. He held that the general rule that the essential terms of a suretyship agreement must appear in a written agreement without the aid of oral evidence was less rigid than counsel contended it to be.¹⁸³ In this regard the court reiterated the general principle, as set out *inter alia* in *Van Wyk*, relating to the admission of extrinsic evidence when it comes to agreements required to be in writing: the content of the agreed terms is merely required to be ascertainable, in which case extrinsic evidence is admissible for the purposes of final ascertainment.¹⁸⁴ Thus, while evidence of the parties' negotiations and consensus may not supplement a deficient suretyship agreement, oral evidence to identify physically that which is referred to in the suretyship agreement is not only permissible but often very necessary.¹⁸⁵ By analogy then, the reference to the acknowledgement of debt in the suretyship agreement need only be such that it is ascertainable, in which case extrinsic evidence is permissible to complete the identification. The reference need not be so complete that the document referred to is identifiable *ex facie* the suretyship.

In the *Cotton* case, the suretyship stated that the principal debt was for a certain capital amount together with finance charges thereon. It also identified the principal debtor by reference to "an" acknowledgement of debt. Miller J continued:

"A written acknowledgment of debt, signed by [the purported principal debtor] for the amount stated in the deed of suretyship and containing details of finance charges as indicated in the deed, is produced in evidence. Moreover, the written acknowledgment of debt so produced was signed at Ladysmith on the very day on which the deed of suretyship was there signed."¹⁸⁶

While these factors tended to indicate that the acknowledgement of debt signed by the principal debtor was the one referred to in the suretyship,¹⁸⁷ they did not conclusively identify the document. As counsel for the surety contended, the reference in the deed of

¹⁸² 329H.

¹⁸³ 330B.

¹⁸⁴ 329E-F.

¹⁸⁵ 330C.

¹⁸⁶ 330 E-F.

¹⁸⁷ Presumably this is what Miller J meant when he stated that "these factors ... [tended] to identify the acknowledgment of debt with the deed of suretyship" (330F-G).

suretyship was not such that it served to exclude the possibility that there may have been a second acknowledgement of debt in favour of the plaintiff, signed on the same day and for the same amount but which did not create the obligation that the suretyship in issue was intended to secure. While the court agreed that there remained a certain degree of ambiguity,¹⁸⁸ it allowed extrinsic evidence to complete the reference to “an” acknowledgement of debt on the basis that the parol evidence rule does not exclude consideration of background circumstances when interpreting a written document, particularly when such evidence assists in physically identifying the document referred to in the deed of suretyship.¹⁸⁹ As a result the suretyship, read together with the acknowledgement of debt, was held to be sufficient to satisfy section 6 of the Act.

Approximately five months later and this time in the Appellate Division, in the decision of *Fourlamel (Pty) Ltd v Maddison*,¹⁹⁰ (“*Fourlamel*”), the same judge held that a lease agreement expressly referred to in a *domicilium* clause of a suretyship could not be incorporated into that agreement in order to supply missing terms relating to the identity of the creditor and the principal debtor.¹⁹¹ Nor was he swayed by the fact that the lease agreement itself required the lessee to provide the lessor with security in the form of a suretyship.¹⁹² According to Miller JA,

“the document with which we are now concerned refers in the final paragraph thereof to ‘the leased premises referred to in the deed of lease annexed hereto’, but that paragraph deals exclusively with the selection of *domicilium* and is in no way linked with any debt or debts for which respondent was to be a surety. Nor does the fact that the deed of lease requires the lessee to furnish the lessor with a guarantee in the form of a standard suretyship deed, achieve the necessary link. The object of appellant in attempting to read the deed of lease into the document is to establish in writing the identity of the creditor and principal debtor, left blank in the document as signed by the respondent. The mere fact that the lease is referred to in the context of a *domicilium executandi* provision in the document, does not by any means, without evidence of the verbal agreement of the parties, establish that the lessee described in the deed of lease is the principal debtor in respect of whose debts the respondent was undertaking to be a surety.”¹⁹³

¹⁸⁸ 330G-H.

¹⁸⁹ 331B.

¹⁹⁰ 1977 1 SA 333 (A).

¹⁹¹ 345G.

¹⁹² 345G.

¹⁹³ 345F-H.

Both these cases were considered in *Trust Bank van Afrika Bpk v Sullivan*¹⁹⁴ (“*Sullivan*”). Here too the relevant suretyship agreement failed to identify the principal debtor, but simply described it as “the lessee”.¹⁹⁵ However, the suretyship did contain an express reference to a lease agreement, and its date, as creating the principal obligation that the suretyship was intended to secure. The deed of suretyship also proved to have been signed on the same day as the lease agreement produced in court.¹⁹⁶

Viljoen J recognised that the principle of incorporation could be used to supplement missing details in a suretyship, but held that a prerequisite for such incorporation was that the reference to the second document must be such that the second document is properly identified by mere production and comparison.¹⁹⁷ According to him this would be consistent with the general principle that a suretyship agreement is valid if the terms are ascertainable.¹⁹⁸ If extrinsic evidence was necessary to determine which document was intended, incorporation by reference could not occur because it would be contrary to the parol evidence rule.¹⁹⁹

Viljoen J criticised the *Cotton* decision as amounting to an incorrect application of the law to the facts. He was of the opinion that in that case, the reference to the written acknowledgment of debt was insufficient to render the document ascertainable, since extrinsic evidence was required to supplement the description in the deed of suretyship in order to identify the acknowledgement of debt signed by the principal debtor as the one referred to as “an” acknowledgement of debt.²⁰⁰ While he did not exclude the possibility that evidence may be required to indicate that the second document has been retrieved from a file or other place where it was kept, a mere comparison between the two documents must make it clear that the second document is the one to which reference is made *ex facie* the suretyship agreement.²⁰¹ The fact that the same judge in the *Cotton* case had come to an apparently opposite conclusion in the subsequent *Fourelamel* case

¹⁹⁴ 1979 2 SA 765 (T).

¹⁹⁵ 767E.

¹⁹⁶ 767H.

¹⁹⁷ 769E.

¹⁹⁸ 769F.

¹⁹⁹ 769F, 770E.

²⁰⁰ 770D-E.

²⁰¹ 770E.

suggested to Viljoen J that Miller JA had come to different insights and that this fact provided support for his conclusion that

“[i]n die huidige geval ontbreek na my mening die nodige *nexus*. Daar is ‘n verwysing in die borgakte na ‘n ‘lease’ tussen die verhuurder en die huurder maar die huurder se naam is blanko gelaat. Die datums op die twee dokumente is dieselfde, maar dit mag toevallig gewees het. Die handtekeninge van die borge is ook dieselfde as die handtekeninge van die twee persone wat namens die huurder geteken het, maar ook dit mag toevallig gewees het. Dit skakel nie die moontlikheid uit dat daar ander ooreenkomste tussen dieselfde partye op dieselfde dag aangegaan is nie, en dat dieselfde borge geteken het vir enige ander ooreenkoms nie. Die ontbrekende naam moes dus aangevul word deur mondelinge getuienis wat verwys na die ooreenkoms, en die ooreenkoms was nie by blote voortbrenging so geïdentifiseer dat dit gesê kan word dat dit die ooreenkoms is waarna verwys is in die borgakte nie.”²⁰²

Despite the fact that Viljoen J was of the opinion that he was merely confirming the conclusion drawn in the *Fourelamel* judgment, it is arguable that the judge lost sight of a number of factors. First, if Miller JA did indeed come to different insights in the five months between delivering the *Cotton* and *Fourelamel* judgments, then the lack of reference to the former judgment in the latter strikes one as peculiar. In *F J Mitrie (Pty) Ltd v Madgwick*,²⁰³ James JP observed that

“if [Miller JA] had considered that anything in the judgment in [*Fourelamel*] conflicted with his remarks in the *Trust Bank* case, he would have dealt with the conflict and resolved it. Since he delivered judgment in the *Trust Bank* case on 11 June 1976, and the *Fourelamel* case on 5 November 1976, it is ... inconceivable that he would have overlooked his earlier judgment.”²⁰⁴

Secondly, and related to the first point, if Miller JA did not intend to overturn his earlier *Cotton* judgment, then this implies that he discerned a very real difference between the facts of the *Cotton* and *Fourelamel* cases. This does indeed appear to be so: the former dealt with the degree of specificity with which a reference, made in the correct context, should identify a further document to be incorporated; the latter deals with the sufficiency of the context in which the reference was made – it was not apparent from the suretyship that the parties had agreed that the lease agreement gave rise to the principal debt since it was only referred to incidentally in the *domicilium* clause.

²⁰² 771A-D.

²⁰³ 1979 1 SA 232 (D).

²⁰⁴ 235A.

Finally, while the court in *Cotton* did appear to broaden the concept of objective ascertainability, it was not in fact adopting a new approach. What the court in the *Sullivan* case appears to lose sight of, and what is only referred to indirectly in *Cotton*, is the fact that the reference in the suretyship to “an” acknowledgement of debt in the latter case was latently ambiguous. As noted in *Estate Du Toit v Coronation Syndicate Ltd*,²⁰⁵

“[although], from a perusal of the document, the [object] may appear to be adequately described, nevertheless it may be found in fact to fit more than one [object], or the physical facts may introduce uncertainty. Ambiguity of that kind would be latent and evidence would be permissible to dispel the doubt raised not by the document itself, but outside it.”²⁰⁶

Furthermore, it is simply not correct to assume, as Viljoen J seemed to do, that when a reference is ambiguous, extrinsic evidence to indicate which document was intended to be incorporated by the parties must be precluded. The judge seemed to think that this evidence would necessarily relate to the parties’ prior negotiations or consensus. There is a difference between inferring the parties’ intention from background circumstances and inferring their intention from evidence of their negotiations or actual oral consensus itself.²⁰⁷

The effect of the *Sullivan* decision therefore appears to be that a reference to another document must fulfil two requirements before that document can be incorporated. First, the reference must indicate the relationship between the absent term and the document to be incorporated and secondly, the reference must be so specific that the document can be identified *ex facie* the agreement which refers to it.²⁰⁸ As discussed above, this approach

²⁰⁵ 1929 AD 219.

²⁰⁶ 224.

²⁰⁷ See eg the court’s discussion of the relevant evidence which indicated that the particular acknowledgement of debt was the one referred to in the suretyship agreement and which formed part of the background circumstances in *Trust Bank of Africa Ltd v Cotton* 1976 (4) SA 325 (N) 330H-331F. The rule relating to the invariable exclusion of evidence relating to negotiations and consensus has since been relaxed so that it is now admissible when such evidence is tendered for identification purposes, and not to supplement an incomplete agreement. See *General Accident Insurance Company SA Ltd v Dancor Holdings (Pty) Ltd* 1981 4 SA 968 (A) 978G; *Heathcote v Finwood Papers (Pty) Ltd* 1997 2 All SA (E) 40.

²⁰⁸ The requirements set out for a sufficient reference in *Trust Bank van Afrika Bpk v Sullivan* 1979 2 SA 765 (T) were subsequently adopted in *Hartland Implemente (Edms) Bpk v Enal Eiendomme* 2002 3 SA 653 (NC) 669F-G per Van den Heever AJ, this time in the context of the sale of land:

is less flexible than that in *Cotton*, in terms of which further extrinsic evidence is permissible to complete the reference.

As a result of these apparently contradictory judgments, the following question has been raised in relation to the principle of incorporation:

“Is it necessary that the reference in the suretyship to the other document be sufficiently clear for it to be identified *ex facie* itself and the suretyship, or is it sufficient if the other document can be identified by further oral evidence?”²⁰⁹

The second option was favoured, on the basis that identification of the other document by oral evidence would not frustrate the policy behind the General Law Amendment Act.²¹⁰ This question, and the judgments which gave rise to it, was addressed in *Industrial Development Corporation of SA (Pty) Ltd v Silver*²¹¹ (“*Industrial Development Corporation*”).

In this case, the Supreme Court of Appeal was also required to determine the validity of a suretyship which contained a blank space for the name of the principal debtor. The document specified the amount of the principal debt, that the debt was incurred in terms of “the loan agreement”, and that the loan agreement was to be entered into simultaneously with the deed of suretyship.²¹² The loan agreement sought to be incorporated not only identified the principal debtor, but it also appeared to be for the same amount as that referred to in the deed of suretyship, was signed on the same day as the suretyship and furthermore, contained a provision that any money lent in terms of the agreement was conditional upon the respondent standing surety for the principal debtor’s obligations.²¹³

“Indien ‘n koopkontrak nie die koopprys omskryf nie, en daar staatgemaak word daarop dat die koopprys in ‘n ander dokument beskryf is en daardie dokument deur verwysing geïnkorporeer is, moet die ander dokument nie alleen identifiseerbaar wees met verwysing na die koopkontrak nie, maar die koopkontrak moet dit ook inkorporeer in verband met die koopprys of die bepaling daarvan.”

²⁰⁹ C F Forsyth & J T Pretorius *Caney’s The Law of Suretyship* 5 ed (2002) 68.

²¹⁰ 68.

²¹¹ 2003 1 SA 365 (SCA).

²¹² Para 2.

²¹³ Para 3.

The court explicitly confirmed that the principle of incorporation by reference applied not only to sales of land but also to contracts of suretyship.²¹⁴ It also reiterated the rule set out in *Oberholzer v Gabriel*²¹⁵ to the effect that where there is a sufficient description of the subject-matter referred to in a contract, parol evidence can never be excluded to link that description to its physical counterpart. This evidence of relationship (or then, identification) may be given by the parties themselves or by anyone else, provided only that it does not amount to evidence of negotiation or consensus.²¹⁶

Against this background, the court proceeded to distinguish the judgment in *Fourlamel*. It held that the reason why the lease could not be incorporated into that deed of suretyship was due to the fact that it was not apparent *ex facie* the deed of suretyship that the lease sought to be incorporated was the document giving rise to the indebtedness secured:²¹⁷ the reference to the lease agreement was made in a *domicilium* clause, and not in the context of the description of the secured debt. If extrinsic evidence were to be admitted, such evidence would not only have to identify the lease as the one referred to in the deed of suretyship, but would also have been necessary to establish that the debt created by the lease was the debt secured by suretyship. This additional evidence would of necessity have been direct evidence of what the parties had intended and therefore inadmissible.²¹⁸

As for *Cotton*, the court held that that had been correctly decided because

“it was clear *ex facie* the deed of suretyship that the document sought to be incorporated did indeed give rise to the indebtedness secured by the suretyship. All that was required, therefore,

²¹⁴ *Industrial Development Corporation of SA (Pty) Ltd v Silver* 2003 1 SA 365 (SCA) para 6. Until this decision, the principle had only been applied in High Court decisions and in *Fourlamel (Pty) Ltd v Maddison* 1977 1 SA 333 (A), the then Appellate Division was only prepared to assume for the sake of argument that incorporation by reference applied to suretyship agreements, without deciding the issue.

²¹⁵ 1946 OPD 56 59. Quoted above in 4 3 1.

²¹⁶ *Industrial Development Corporation of SA (Pty) Ltd v Silver* 2003 1 SA 365 (SCA) para 10. This limitation on extrinsic evidence appears to contradict the conclusion drawn in *General Accident Insurance Company SA Ltd v Dancor Holdings (Pty) Ltd* 1981 4 SA 968 (A) 978G, in which it was held that extrinsic evidence of the parties' negotiations or consensus is permissible for the limited purpose of identification. Presumably, the exclusion relating to evidence of negotiations or consensus referred to direct evidence of what the parties had intended, because *General Accident Insurance Company SA Ltd v Dancor Holdings (Pty) Ltd* 1981 4 SA 968 (A) is cited with approval - see *Industrial Development Corporation of SA (Pty) Ltd v Silver* 2003 1 SA 365 (SCA) para 9.

²¹⁷ *Industrial Development Corporation of SA (Pty) Ltd v Silver* 2003 1 SA 365 (SCA) para 11.

²¹⁸ Para 11.

was extrinsic evidence identifying that document as the document referred to in the deed of suretyship.”²¹⁹

Since *Sullivan* fell in the same category as *Cotton*, it should have been decided differently, since all that was required there was extrinsic evidence identifying the lease agreement as the one referred to in the suretyship agreement.²²⁰ According to the court in *Industrial Development Corporation*, the reference in the suretyship before it also fell into this category:

“[T]he deed of suretyship ... similarly makes it clear that the debt secured is the loan in terms of the loan agreement sought to be incorporated. Extrinsic evidence identifying the loan agreement as the one referred to is all that would be required and is therefore admissible.”²²¹

At this point in the judgment, it becomes apparent that what the court considers to be a sufficient reference *ex facie* the suretyship is less than what the *Sullivan* judgment required. In *Sullivan*, Viljoen J had held:

“Indien [die] wesenlike besonderhede nie uitdruklik in die borgakte voorkom nie, maar daar in die borgakte verwys word na ‘n ander dokument waarin hulle wel voorkom, kan dit moontlik gesê word dat die wesenlike voorwaardes by wyse van verwysing in die borgakte ingelyf is, maar dan moet die ander dokument *ex facie* die borgakte, met ander woorde, ooreenkomstig die verwysing in die borgakte, *behoorlik identifiseerbaar wees by wyse van blote voortbrenging en vergelyking*.”²²²

Thus, the nature of the reference to the other document must be so specific that that document can simply be produced, its content compared with the reference *ex facie* the suretyship, and the conclusion drawn that this is indeed the document referred to in the deed.

If the court in *Industrial Development Corporation* subscribed to the same requirement, then extrinsic evidence should have been unnecessary to identify “the loan agreement” as the one being produced in evidence. It would appear, therefore, that when the court stated that “it was clear *ex facie* the deed of suretyship that the document sought to be

²¹⁹ Para 12.

²²⁰ Para 12.

²²¹ Para 13.

²²² *Trust Bank van Afrika Bpk v Sullivan* 1979 2 SA 765 (T) 769D-E (emphasis added).

incorporated did indeed give rise to the indebtedness secured by the suretyship²²³ it was not referring to the specificity of the reference, but rather to the fact that the reference to another document must be made in a manner which indicates its relationship to the term it is supposed to complete or supplement, simply by examining the face of the suretyship.

Where a suretyship fails to identify a principal debtor, but refers to a loan agreement which does, the reference must make it clear that it is that loan agreement which constitutes the principal debt and which the suretyship is intended to secure, before its terms can also be used to identify the principal debtor. It is the absence of this contextual link that prevented a lease agreement, which created the principal debt but which was only referred to in a domicile clause, from being incorporated in the suretyship in the *Fourlamel* case. Had the court permitted the lease to be incorporated, extrinsic evidence would not only have had to identify the lease as the one referred to, but also that the parties had agreed that the suretyship was intended to secure the debt created by that lease. This would have been contrary to both the parole evidence rule and statutory formalities.

The effect of *Industrial Development Corporation* on the principle of incorporation by reference appears to be the following: the relationship between the absent term, the context in which the other document is referred to, and that document itself must be clear *ex facie* the agreement required to be in writing. Arguably, there are good policy reasons for such a requirement: in the absence of such a nexus, any document could be incorporated and the possibility of fraud, perjury or uncertainty increased. Secondly, the description of the document sought to be incorporated must be sufficiently certain that extrinsic evidence linking the description to the actual document is for identification purposes alone. Contrary to the *Sullivan* decision, this description does not need to be so precise that the document need merely be produced and compared to the description. However, it should be of such a nature that the parties need not give direct evidence of their intention in order to identify that document. The fact that a description like “the loan agreement” or “an” acknowledgement of debt could refer to more than one particular loan agreement or acknowledgement of debt has less to do with the sufficiency of the reference itself, and more to do with the difficulty of applying the description to the actual facts. Such a latent ambiguity, however, is always capable of being resolved through the admission of

²²³ *Industrial Development Corporation of SA (Pty) Ltd v Silver* 2003 1 SA 365 (SCA) para 12.

extrinsic evidence. In other words, it becomes an issue of interpretation and applying the terms of the agreement to the facts of the case.

A consideration of the South African approach to incorporation by reference raises the following question: should incorporation by reference be limited to cases in which an agreement expressly refers to the document sought to be incorporated or can the same effect be achieved in another manner? Here an examination of certain common-law jurisdictions may be enlightening.²²⁴

4 4 2 Common-law jurisdictions

Common-law jurisdictions also use the principle of incorporation by reference (or “joinder of documents”) in order to ensure compliance with the Statute of Frauds or its functional equivalents.²²⁵ In England, it was already settled by the nineteenth century that a plaintiff might rely on two or more documents to prove his case, provided that the agreement specifically and on its face referred to the other document(s).²²⁶ As in *Sullivan*, it appears that the reference was required to be so specific that the other document needed merely to be produced and compared in order to conclude that it was the document referred to in the agreement.²²⁷

However, the requirement that there must be an express reference to another document in an agreement subject to formalities has subsequently been relaxed further in both English and American law. It now appears that an implied reference will suffice.

²²⁴ In German law, the application of the *Andeutungstheorie* permits more than one document to be read together, provided that there is some indication of a reference to another document in the agreement subject to formalities. See 4 2 1 above; M Habersack “§ 766” in M Habersack (ed) *Münchener Kommentar zum Bürgerlichen Gesetzbuch 5 Besonderer Teil III:705-853* 5 ed (2009) n 8.

²²⁵ G M Andrews & R Millett *The Law of Guarantees* 5 ed (2008) 64-65; C N Brown *Corbin on Contracts 4: Statute of Frauds* §§ 12.1-23.11 (1997) 773 ff; M Furmston *Cheshire, Fifoot & Furmston's Law of Contract* 15 ed (2007) 274; J O'Donovan & J Phillips *The Modern Contract of Guarantee* (2003) 109. The English Statute of Frauds has been adopted, either wholesale or with some variations in its wording and scope, in most other common-law jurisdictions. However, the term statute of frauds is also a generic term describing legislation imposing statutory formalities eg § 2-201 (sales of goods) of the Uniform Commercial Code is referred to as a statute of frauds – see Brown *Corbin on Contracts* 4 § 15.

²²⁶ Furmston *Contract* 274.

²²⁷ See eg *Peirce v Corf* (1874) LR 9 QB 210 217; *Rushton v Whatmore* (1878) LR 8 Ch D 467 468.

What constitutes an implied reference is illustrated by the following case law. In *Long v Millar*²²⁸ (“*Long*”) Long signed a formal agreement to purchase three plots of land at Hammersmith and paid a deposit of £31. On receiving the deposit, Millar signed a separate document which indicated that he had “[received] £31 as a deposit on purchase of three plots of land at Hammersmith”.²²⁹ The formal agreement contained all the essential terms except the name of the vendor. The question was whether the receipt, which contained the vendor's name and signature, could be incorporated into this agreement in order to supplement the missing terms.

According to Bramwell LJ,

“the point to be established by the plaintiff is that the defendant has bound himself, and a receipt was put in evidence signed by him, and containing the name of the plaintiff, the amount of the deposit, and some description of the land sold. The receipt uses also the word ‘purchase,’ which must mean an agreement to purchase, and it becomes apparent that the agreement alluded to is the agreement signed by the plaintiff, as soon as the two documents are placed side by side. The agreement referred to may be identified by parol evidence.”²³⁰

And Thesiger LJ held:

“The first question is whether there is a sufficient reference in the receipt signed by the defendant to allow us to connect it with the document signed by the plaintiff. When it is proposed to prove the existence of a contract by several documents, it must appear upon the face of the instrument signed by the party to be charged that reference is made to another document; and this omission cannot be supplied by verbal evidence. If, however, it appears from the instrument itself that another document is referred to, that document may be identified by verbal evidence. A simple illustration of this rule is given in *Ridgway v. Wharton* [6 HLC 238; 27 LJ (Ch) 46]; there ‘instructions’ were referred to; now instructions may be either written or verbal; but it was held that parol evidence might be adduced to show that certain instructions in writing were intended. This rule of interpretation is merely a particular application of the doctrine as to latent ambiguity. Although parol evidence may be given to identify the document intended to be referred to, it must be clear that the words of the document signed by the party to be charged will extend to the document sought to be identified.”²³¹

²²⁸ (1879) 4 C PD 450.

²²⁹ 451.

²³⁰ 454.

²³¹ 455-456 (footnote omitted).

A more complicated example of joinder of documents is found in *Clipper Maritime Ltd v Shirlstar Container Transport Ltd*,²³² in which three telexes, and possibly the addition of the actual charter-party, were read together to constitute a sufficient memorandum of a guarantee given by the defendant. The first telex set out the terms of the guarantee, but contained no express reference to subsequent documents and was not signed by the guarantor.²³³ The second telex referred to “the letter of guarantee” contained in the previous telex. The third referred back to the second by its reference number and was signed on behalf of the guarantor, indicating that it considered itself bound to the terms of the guarantee. Joinder of the documents was permitted because the first set out the terms, the second referred to those terms and the third (which was signed by the guarantor) referred to the second by reference number and thus, by implication, to the terms contained in the first.²³⁴

Therefore, where several documents deal with the same subject-matter, these documents are regarded as impliedly referring to each other and can be read together to constitute a sufficient memorandum. This so-called “same transaction test”²³⁵ is also applied in certain jurisdictions in the United States, most notably in a series of New York cases.²³⁶ The leading decision in this regard is that of the New York Court of Appeals in *Crabtree v Elizabeth Arden Sales Corp.*²³⁷

Here, the plaintiff sought to hold the defendant company liable for breach of contract, because it failed to pay an alleged increase in his salary as indicated in two separate payroll change cards, signed by representatives of the company. While each payroll card set out the terms of the employment relationship,²³⁸ neither one indicated that it would continue for a period of more than one year.²³⁹ However, there was another document,

²³² [1987] 1 Lloyd's Rep 546.

²³³ 556.

²³⁴ 556.

²³⁵ Brown *Corbin on Contracts* 4 774.

²³⁶ *Dickerson v Kaplan* 763 F Supp (1990) 694 (E D N Y); *Crabtree v Elizabeth Arden Sales Corp.* (1953) 305 N Y 48; *Horn & Hardart Co. v Pillsbury Co.* (1989) 888 F 2d 8 (2d Cir); *Steinborn v Daiwa Securities America, Inc.* (1995) 1995 WL 761286 (S D N Y).

²³⁷ (1953) 305 N Y 48.

²³⁸ 53.

²³⁹ The contract itself was subject to the relevant statute of frauds because it would not be completely performed within a year from contract conclusion (53). S 4 of the original Statute of Frauds also prescribed formal requirements for these types of contracts.

setting out the terms of the employment relationship and its duration, which had been drafted at an earlier stage, and the court was required to consider whether this document could be read together with the others in order to constitute an enforceable memorandum.

The court reiterated the basic principle that the applicable statute of frauds does not require a memorandum to be contained in a single document, but permits it to be pieced together from separate writings connected to one another either expressly or by the internal evidence of “subject-matter and occasion”.²⁴⁰ Where signed and unsigned documents appear to refer to the same subject-matter or transaction, oral evidence is permitted to finalise the connection between them and to establish the acquiescence of the party to be charged to the contents of the unsigned document.²⁴¹

However, there are two threshold requirements before the relevant documents will be read together. First, the document which establishes the contractual relationship between the parties must be signed by the party against whom the memorandum will be enforced.²⁴² On the facts, this was indeed the case because both payroll change cards contained the names of the parties, the plaintiff’s job description and the terms of payment and they were signed by representatives of the company as employer.²⁴³ Secondly, *ex facie* the documents, it must be clear that the unsigned document relates to the same transaction as the signed document.²⁴⁴ According to the court, these two threshold requirements would minimise the possibility of fraud and perjury. In these circumstances,

“[p]arol evidence to portray the circumstances surrounding the making of the memorandum serves only to connect the separate documents and to show that there was assent, by the party to be charged, to the contents of the one unsigned. If that testimony does not convincingly connect the papers, or does not show assent to the unsigned paper, it is within the province of the judge to conclude, as a matter of law, that the statute has not been satisfied. True, the possibility still remains that, by fraud or perjury, an agreement never in fact made may occasionally be enforced under the subject matter or transaction test. It is better to run that risk, though, than to deny enforcement to all agreements, merely because the signed document made no specific mention of the unsigned writing. As the United States Supreme Court

²⁴⁰ 54.

²⁴¹ 55.

²⁴² 56.

²⁴³ 53.

²⁴⁴ 56.

declared [in *Beckwith v Talbot* 95 US 289 292], in sanctioning the admission of parol evidence to establish the connection between the signed and unsigned writings[.]

'[t]here may be cases in which it would be a violation of reason and common sense to ignore a reference which derives its significance from such (parol) proof. If there is ground for any doubt in the matter, the general rule should be enforced. But where there is no ground for doubt, its enforcement would aid, instead of discouraging, fraud.'

²⁴⁵

A generous approach to joinder of documents is also evident in the conclusion that an implied reference permits the joining of an envelope and the document contained within it. Thus a letter beginning "Dear Sir" and signed by the defendant can be joined with the envelope in which it was sent so as to identify the addressee, since the existence of a letter sent by post implies the existence of an envelope containing it.²⁴⁶ Similarly, the mere physical connection of documents has also been held to constitute a sufficient reference.²⁴⁷ The justification for reading these documents together is that the circumstances are such that the possibility of fraud is sufficiently negated.²⁴⁸

Brown argues that the necessity of any internal reference whatsoever, let alone the necessity of a comprehensively identifying internal reference, should depend on the character of the evidence led to connect documents.²⁴⁹ Where the evidence is such that the court is convinced that there is little possibility of fraud and that the two or more documents establish the terms of the agreement with reasonable certainty, internal references should be dispensed with altogether and parol evidence liberally allowed to link the writings. Where the accompanying evidence is less convincing, she maintains, the absence of an internal nexus may be fatal.²⁵⁰

²⁴⁵ 56.

²⁴⁶ *Pearce v Gardner* [1897] 1 Q B 688; *Freeman v Freeman* [1891] 7 TLR 431; *Stokes v Whicher* [1920] 1 Ch 411.

²⁴⁷ In *Love v Dampeer* (1931) 159 Miss 430, 132 So 439, 73 A L R 1376, a list detailing loans was read together with the contract of guarantee to which it was attached. In *McEwan v Dynon* (1877) 3 V L R (L) 271, a guarantee was attached to an account by folding the corners of both documents several times. Similarly, in *Pentax Corporation v Boyd* (1995) 111 Nev 1296, 904 P 2d 1024 1027 the court held that a suretyship agreement included the terms of the credit application form that was found on the reverse side of the same document

²⁴⁸ Brown *Corbin on Contracts* 4 781.

²⁴⁹ 778.

²⁵⁰ 778-780.

According to the author, refusal of relief to an applicant or plaintiff need not be justified “by picky insistence upon doctrines not stated in the statute itself, to the effect that the memorandum must state every material term or that an unsigned memorandum cannot be used unless it is so referred to in a signed one as to be identified without the aid of parol testimony”.²⁵¹ Apparently she would prefer the court to take responsibility for its own conclusion either that fraud is or may be perpetrated, or that this possibility has been sufficiently negated by the evidence presented.

While this seems to be a tenable suggestion, it appears that the generous approach to incorporation by reference in England is no longer possible, at least in the context of the sale of land. As noted in the previous chapter,²⁵² the Law of Property (Miscellaneous Provisions) Act was the product of the English Law Commission’s recommendation that its predecessor, the Law of Property Act 1925, should be replaced. In relation to incorporation by reference, the Commission pointed out that the development of the rule under the old Act created uncertainty as to the sufficiency of the reference required and the degree to which extrinsic evidence would be permitted to complete that reference.²⁵³ For this reason, the Commission suggested that while incorporation should still be permitted under the new regime, the document containing the reference to another document should be signed.²⁵⁴ This suggestion is reflected in section 2(3) of the Law of Property (Miscellaneous Provisions) Act.²⁵⁵

It is unclear to what extent an implied reference is still permissible under the new Act. While the Law Commission was of the opinion that the “same transaction” test should still be applicable,²⁵⁶ one of the few cases dealing with incorporation by reference under the new Act did not address the issue. In *Firstpost Homes Ltd. v Johnson*,²⁵⁷ a letter signed by the defendant as vendor indicated that she agreed to sell a piece of land, “as shown on the enclosed plan”, for a certain sum per acre.²⁵⁸ The plan was attached to the letter with

²⁵¹ 780.

²⁵² See ch 3 (3 2 1).

²⁵³ *Formalities for Contracts for Sale etc of Land (Working Paper No 92)* (1985) para 3.14.

²⁵⁴ *Formalities for Contracts for Sale etc of Land (Law Com No 164)* para 4.6.

²⁵⁵ See Addendum A.

²⁵⁶ See *Formalities for Contracts for Sale etc of Land (Working Paper No 92)* paras 3.12-3.13 read with *Formalities for Contracts for Sale etc of Land (Law Com No 164)* para 4.6.

²⁵⁷ [1995] 1 WLR 1567.

²⁵⁸ 1570.

a paperclip and this plan, but not the letter, was signed by a representative of the plaintiff company as purchaser.

Peter Gibson LJ made the following remarks about section 2 of the Act:

“Section 2 [has] brought about a markedly different regime from that which obtained hitherto ... Whereas the contract or the memorandum or note evidencing the contract previously could be contained in more than one document, only one document is now allowed, save where contracts are exchanged, although reference to another document may be permitted in the circumstances laid down in subsections (2) and (3). Whereas the memorandum or note needed for section 40 [of the Law of Property Act 1925] did not have to contain every term of the contract, all the terms must now be contained in the document in question ... It is to my mind plain that the Act of 1989 ... was intended to make radical changes to such contracts in a way that was intended to simplify the law and to avoid disputes, the contract now being in a single document containing all the terms and signed by all the parties. Thereby it has been sought to avoid the need to have extrinsic evidence as to that contract.”²⁵⁹

The last part of this quotation implies that a more narrow approach to the admission of extrinsic evidence will be applied to contracts falling within the scope of the new Act.²⁶⁰ Furthermore, section 2(1) of that Act provides that all the express terms of the parties' agreement must appear in a recordal.²⁶¹ Taken together, this suggests that implied references to other documents will no longer suffice for joinder to take place and that the English approach is now similar to the South African: where the parties have agreed upon the incorporation of another document, that agreement must be reflected in an express term (ie a reference) in the document. However, it is uncertain to what extent English courts would also insist that the relationship between the missing term and the document sought to be incorporated should be evident *ex facie* the signed document. If they did import such a requirement, then the type of reference in the *Long* case would presumably be insufficient in terms of the new Act. In any event it is unlikely that the documents used in the *Long* case would constitute a valid contract under the new Act. As in *Firstpost*, the document setting out the terms of the agreement between Millar and Long only contained the signature of one of the parties, rather than both of them as required by the Act.

²⁵⁹ 1571.

²⁶⁰ McMeel *Construction of Contracts* 155.

²⁶¹ See Addendum A.

4 4 3 The approaches to incorporation by reference compared

Two different approaches to incorporation by reference have been discussed above. The South African approach (and presumably now also the approach adopted in English law in terms of the Law of Property (Miscellaneous Provisions) Act) requires an express reference to another document before the latter will be incorporated. By contrast, the approach adopted by common-law systems which are still subject to the Statute of Frauds or an equivalent thereof (which would include English law insofar as it relates to guarantees) is rather more liberal, in that an implied reference to another document is sufficient. This raises two questions. First, how may one explain this discrepancy in the type of reference held to be sufficient for incorporation to occur? Secondly, is there any room to develop the South African approach, so that it too could recognise that in certain situations, an implied reference should suffice?

The answer to the first question relates to a topic discussed in the previous chapter, namely the distinction between a contract and a memorandum.²⁶² It was stated there that a memorandum is usually not intended to constitute the exclusive memorial of the parties' agreement. The parol evidence rule is therefore not applicable to these kinds of documents and this allows for greater flexibility in the type of references regarded as sufficient for joinder to take place. The only barrier to a successful joinder of documents where there has been an implied reference is the Statute of Frauds itself. However, as indicated above in *Crabtree v Elizabeth Arden Sales Corp.*,²⁶³ the Statute will not prevent an implied reference as a matter of course; it will only do so if there is a danger of fraud.²⁶⁴

By contrast, a formal requirement which prescribes that an agreement should be in writing results in the treatment of that recordal as the sole record of the parties' agreement. As a result, both formalities and the parol evidence rule preclude the admission of extrinsic evidence to supplement the written agreement. In the context of incorporation by reference, this limitation on the use of extrinsic evidence finds expression in the

²⁶² Ch 3 (3 2 1).

²⁶³ (1953) 305 NY 48.

²⁶⁴ See also English Law Commission *Formalities for Contracts for Sale etc of Land (Working Paper No 92)* (1985) paras 3.11-3.12 and M Furmston *Cheshire, Fifoot & Furmston's Law of Contract* 15 ed (2007) 274-275 in which the lenient approach to joinder of documents in the context of the Statute of Frauds is attributed to the courts' reluctance to allow the relevant formalities to be used as a means to escape an oral agreement.

requirement that there must be an express reference to the document sought to be incorporated. In South African law, there is the additional requirement that the reference must be made in a manner which indicates the relationship between the absent term and the document which is intended to supplement the missing detail. In other words, it must be evident *ex facie* the agreement subject to formalities that the parties agreed that the document would be incorporated in order to supply the missing detail. Apparently this relationship is required to be evident on the face of the agreement because in its absence, the parties would have to give evidence of what they intended, thereby leading to the possibility of fraud, disputes or perjury.

The question is whether there is room for development of the South African approach, so that it too could recognise that implied references should suffice in certain circumstances. Arguably the answer should be in the affirmative. An important (if not the overarching²⁶⁵) purpose of statutory formalities is to prevent fraud and there is nothing in either the Alienation of Land Act or the General Law Amendment Act which suggests that an express reference to the document sought to be incorporated is the only way, or even the best way, to achieve this purpose. For example, it would be particularly formalistic to argue that when it is evident that the parties intended two documents to be read together, the absence of an express reference should prevent this possibility. This point is illustrated in *F J Mitrie (Pty) Ltd v Madgwick*,²⁶⁶ in which the missing identity of the principal debtor in a suretyship was supplemented by information contained in a factoring agreement, not because the suretyship referred to the factoring agreement, but because it was common cause that the parties intended that the two agreements should be kept together as a written record of the entire transaction.²⁶⁷ Although the court's decision was contrary to the rules relating to incorporation by reference, it is arguable that it did not circumvent the purpose of formalities: one can hardly contend that there is a danger of fraud or perjury where both parties have agreed that two documents should be read together as a record of their agreement.

It is therefore argued that instead of focusing on whether there is a sufficiently express reference made in the correct context before incorporation can occur, a South African court should rather focus on the weight to be afforded to the evidence tendered to

²⁶⁵ See ch 2 (2 3 3) and ch 6 (6 2 3).

²⁶⁶ 1979 1 SA 232 (D).

²⁶⁷ 233E.

convince it that the parties intended that the two documents should be read together. If the evidence is unconvincing, then incorporation should be denied. However, if the evidence is convincing and there is little chance of fraud, then incorporation should be allowed, in spite of the absence of an express reference to another document.

4 5 Conclusion

This chapter has considered the interaction between the parol evidence rule, statutory formalities and the admission of extrinsic evidence. It was pointed out that South African courts will admit extrinsic evidence in order to apply the terms of the contract to the facts of the case (in other words, extrinsic evidence is admitted for the purpose of identification).²⁶⁸ Extrinsic evidence is also admitted to determine whether there is a valid and enforceable agreement (a question which may arise as a result of possible error, fraud, duress or misrepresentation)²⁶⁹ or to determine why parties have omitted certain details from their agreement.²⁷⁰ These are not true exceptions to either the parol evidence rule or the rules relating to statutory formalities, because the evidence is not tendered for the purpose of varying, contradicting or supplementing the terms of an agreement subject to formalities, but rather to clarify the terms of the agreement or to show that there was no consensus in the first place.

Somewhat more problematic however, is the South African approach to the admission of evidence regarding an oral suspensive condition.²⁷¹ Case law which has served as authority for the fact such evidence is always admissible appears to construe a suspensive condition as one which suspends the coming into existence of the contract rather than adhering to the generally accepted view in South African law that such a condition merely suspends the enforceability of the agreement. It is suggested that this authority should be approached with caution. Evidence tendered for the purpose of showing that what appears to be a fully enforceable agreement *ex facie* the document is in fact subject to an oral suspensive condition which suspends its enforceability should not be admissible, precisely because it varies or contradicts the written agreement.

²⁶⁸ 4 3 1.

²⁶⁹ 4 3 4.

²⁷⁰ 4 3 2.

²⁷¹ 4 3 3.

A second problem relates to the admission of evidence to show that the written agreement does not contain a material term and is for that reason formally invalid.²⁷² The traditional approach to the determination of formal validity focuses solely on the terms contained in the document in order to determine whether the written agreement complies with formal requirements. If the agreement appears to be formally valid, then this approach specifies further that extrinsic evidence may not be admitted to show that the agreement is formally invalid. The decision in *Philmatt*, which has held that extrinsic evidence of an oral suspensive condition (which is an example of a material term) is always admissible to prove that the agreement is formally invalid, cannot be reconciled with this approach. It is therefore suggested that *Philmatt* should be understood in the light of its particular facts, and should not serve as authority for the general conclusion that such evidence is always admissible to prove that an agreement is formally invalid.

Consideration was also given to the principle of incorporation by reference, both from a South African and common-law perspective.²⁷³ From a South African point of view, it becomes clear that the application of this principle in the context of agreements subject to formalities is both justified and governed by the rules relating to the admission of extrinsic evidence in general. The current approach to this principle dictates that two requirements should be met before incorporation will occur. First, there must be a sufficiently express reference to the document sought to be incorporated so that any extrinsic evidence necessary to complete the reference would simply assist in identifying the exact document referred to in the agreement. Secondly, the reference must be made in such a manner that the relationship between the absent term, the context in which the other document is referred to, and that document itself must be clear *ex facie* the agreement required to be in writing. In the absence of such a nexus, any document could be incorporated and this, in turn, could create the temptation to commit fraud or perjury.

However, an examination of the common-law approach to incorporation by reference in terms of the Statute of Frauds or a common-law equivalent thereof, illustrates that in certain cases, an implied reference may be sufficient. Although the discrepancy between the South African and common-law approach may be explained on the basis of the nature of the document required in each jurisdiction (a contract in the former and a memorandum in the latter) it is suggested that the merit of the common-law approach is that it places the

²⁷² 4 3 4.

²⁷³ 4 4.

emphasis, correctly it is argued, on whether the extrinsic evidence necessary to connect two or more documents is convincing enough that the possibility of fraud is minimal. It is therefore submitted that there is room for development of the South African approach in the light of the overarching objective of formalities, namely the prevention of fraud, so that in certain cases it should be sufficient for incorporation to take place in spite of the absence of an express reference.

One further point of interaction between statutory formalities, the parol evidence rule and extrinsic evidence which has not been considered, is that of rectification. This remedy is granted on the strength of extrinsic evidence relating to the parties' actual consensus - evidence which is inadmissible when interpreting the agreement.²⁷⁴ Furthermore, certain additional requirements apply to the rectification of agreements subject to formalities which are not imposed on agreements which are form-free. This topic therefore merits special attention and is the subject of the next chapter.

²⁷⁴ See 4 2 3 above.

CHAPTER 5: THE RECTIFICATION OF AGREEMENTS SUBJECT TO STATUTORY FORMALITIES

5 1 Introduction

In the previous chapter, it was noted that where an agreement subject to formalities has been reduced to writing, extrinsic evidence of the parties' oral agreement and negotiations is generally excluded by two rules.¹ First, there is the statutory rule that the terms of a contract that is required by law to be in writing must appear from the written document itself: where the written document is incomplete, it cannot be supplemented by extrinsic evidence. Secondly, if a written contract constitutes the exclusive memorial of the agreement, the parol evidence rule also precludes the admission of extrinsic evidence, to the extent that such evidence adds to, varies or contradicts any part of it. It was also evident in that chapter that while the rules precluding the admission of extrinsic evidence are not absolute, most instances of the admission of such evidence do not really constitute exceptions to either rule.

This chapter deals with the rectification of agreements subject to formalities – the process of correcting a written document so that it gives effect to the parties' true intention. From one perspective, the rules relating to rectification could simply be regarded as part of the rules governing the admissibility of extrinsic evidence. Strictly speaking, rectification could therefore have been considered in the previous chapter. However, there are so many unique aspects to the South African approach to rectification of agreements subject to statutory formalities that it rather merits a chapter of its own.

In what follows, attention will be paid to whether the South African approach to rectification of agreements subject to formalities is consistent;² whether the procedure adopted by our courts promotes the functions of formalities;³ and whether the interpretation of the requirements for a successful claim for rectification is consistent with the policy underlying the imposition of formalities.⁴ Comparative observations will also be made where relevant.

¹ Ch 4 (4 2).

² 5 3.

³ 5 3.

⁴ 5 4.

5.2 The origins of rectification and the current South African approach

Rectification is an equitable remedy, designed to correct a document which is an inaccurate reflection of the parties' agreement.⁵ The precise origins of the remedy in South African law are unclear. Some judgments and commentators maintain that the remedy is English in origin and that it was received in South African law as a necessary exception to the English parol evidence rule. For example, in one of the earliest cases on rectification, *Saayman v Le Grange*,⁶ the court stated that rectification was based on English law and that no similar remedy could be found in Roman and Roman-Dutch law.⁷ The relationship between rectification and the parol evidence rule was indicated *inter alia* in *Meyer v Merchant's Trust Ltd*⁸ where the court held that

"owing to the acceptance of the English rule that, when a contract has been expressed in writing, the writing is regarded as the exclusive memorial of the transaction, so that in a suit between the parties no evidence to prove the terms of the contract may be given save the document ... the need has arisen, as in English practice, for rectification".⁹

Rectification is also regarded as an exception to the parol evidence rule in English law:

"[T]he remedy of rectification can be seen as a specific response to two major characteristics or, one might be tempted to say, shortcomings of the traditional English approach to contractual interpretation ... The first of these is literalism. Rectification enables the court to deviate from the 'plain and unambiguous' meaning that a term has in the ordinary language because the context and the circumstances indicate that this meaning is not what the parties actually intended. The second is the inadmissibility of extrinsic evidence. Rectification necessarily

⁵ *Intercontinental Exports (Pty) Ltd v Fowles* 1999 2 All SA 304 (A) para 11.

⁶ (1879) 9 Buch 10.

⁷ 12 per De Villiers CJ; 13 per Dwyer J.

⁸ 1942 AD 244.

⁹ *Meyer v Merchant's Trust Ltd* 1942 AD 244 253 per De Wet CJ. See also *Caithness v Fowlds* 1910 EDL 261 264-265; *Venter v Liebenberg* 1954 3 SA 333 (T) 338C; *Brits v Van Heerden* 2001 3 SA 257 (C) 266D-E, 278F; *Von Ziegler v Superior Furniture Manufacturers (Pty) Ltd* 1962 3 SA 399 (T) 410A-C; H J Liebenberg "Die Begrip 'Mutual Error' by Rektifikasie van Kontrakte" (1994) 15 *Obiter* 137; D T Zeffertt & A Paizes *Parol Evidence with Particular Reference to Contract* (1986) 10.

presupposes that such evidence is admitted in order to establish the parties' intentions ... In fact rectification is usually listed among the exceptions to the parol evidence rule."¹⁰

If South African law did indeed receive the remedy of rectification from English law, then the requirements for a successful claim were relaxed by the South African courts. In the 1920s, the then Appellate Division held that a party need not prove the existence of a prior, validly concluded contract in order to succeed with a claim for rectification of a subsequent recordal – proof of a prior agreement was sufficient.¹¹ This requirement was further relaxed by the same court some 20 years later, so that a prior common intention (rather than agreement or contract) would suffice.¹² In English law, this matter was only settled in the 1970s.¹³

Other South African cases, like *Weinerlein v Goch Buildings Ltd*¹⁴ and *Neuhoff v York Timbers Ltd*,¹⁵ suggest that rectification has civilian roots and is based on the *exceptio doli generalis*.¹⁶ The *exceptio doli* in turn has its roots in Roman law and was a defence that could be raised whenever it would be inequitable or unjust for an agreement to be strictly enforced: a party should not be allowed to base his claim on a document which he knows is not an accurate reflection of the parties' actual agreement. Thus, in *Weinerlein v Goch Buildings Ltd*,¹⁷ one finds statements to the effect that

"[f]rom the earliest times the Roman law has set its face against a person benefitting himself by his own fraud or by a mutual mistake even if the strict interpretation of the law seems at first blush to give him that right"¹⁸

¹⁰ S Vogenauer "Interpretation: Concluding Comparative Observations" in A Burrows & E Peel (eds) *Contract Terms* (2007) 123 139-140. The author also points out that there is a causal link between the parol evidence rule, which developed in the late sixteenth century, and the appearance of the remedy of rectification in the early seventeenth century (139 n 53).

¹¹ *Weinerlein v Goch Buildings Ltd* 1925 AD 282 288 per De Villiers JA.

¹² *Meyer v Merchant's Trust Ltd* 1942 AD 244 253. This development is discussed in detail in 5.4.2 below.

¹³ *Joscelyne v Nissen* [1970] 2 QB 86 98.

¹⁴ 1925 AD 282 292-293 per Wessels JA; 296-297 per Kotze JA.

¹⁵ 1981 4 SA 666 (T) 673E. See also *Mouton v Hanekom* 1959 3 SA 35 (A) 40A-B; *Van Aswegen v Fourie* 1964 3 SA 94 (O) 98A; *Otto v Heymans* 1971 4 SA 148 (T) 156A-B.

¹⁶ See also R Zimmermann "Good Faith and Equity" in R Zimmerman & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 217 227-228.

¹⁷ 1925 AD 282.

¹⁸ 291-292 per Wessels JA.

and that

“the rectification of a written document ... is a well-settled rule with us in South Africa; and it is derived, whence most equitable rules have originated, from the *Corpus Juris*”¹⁹

and that

“the Court will not allow [an agreement subject to statutory formalities] to be used as an engine of fraud ... and in order to prevent this it will cause the written contract ... to be rectified ... [T]his right is an inherent right of our courts and is well within their traditional equitable jurisdiction.”²⁰

However rectification and the *exceptio doli* are not identical in their scope. The latter was only a defence to a claim based on an inaccurate recordal, while the former can also be used to correct that recordal.²¹

Still others have argued that the remedy is neither an exception to the parol evidence rule, nor based on the *exceptio doli*, but is simply a reflection of the general rule that a contract is binding because of the parties' consensus or a reasonable reliance on consensus.²²

Irrespective of its origin, underlying the acceptance of the remedy in South African law is the broad general principle that “in contracts regard must be had to the truth of the matter rather than to what has been written, and the mistake must yield to the truth”.²³

¹⁹ *Weinerlein v Goch Buildings Ltd* 1925 AD 282 297 per Kotze JA. See also the references to civilian sources in the judgment of De Villiers JA (289), although it is not entirely clear whether the judge was of the opinion that rectification was received from English law but that it showed similarities with the civilian approach (as argued by J F Malan *Aspekte van Rektifikasie in die Suid-Afrikaanse Kontraktereg* LLD thesis Pretoria (1987) 5) or whether the judge was in fact pointing out that rectification has civilian roots.

²⁰ *Weinerlein v Goch Buildings Ltd* 1925 AD 282 293 per Wessels JA. See also A J Kerr *The Principles of the Law of Contract* 6 ed (2002) 146 n 644.

²¹ See Zimmermann “Good Faith and Equity” in *Southern Cross* 229. Although it was decided in *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 607A-B that the *exceptio doli* did not form part of the South African common law, the remedy of rectification remains.

²² S W J van der Merwe, L F van Huysteen, M F B Reinecke & G F Lubbe *Contract - General Principles* 4 ed (2012) 153-154; *Strydom v Coach Motors (Edms) Bpk* 1975 4 SA 838 (T) 840E-F.

While rectification of agreements subject to formalities is permitted, the South African approach in such cases consists of two distinct steps. These steps will serve as the focal points of this chapter. First, *ex facie* the document, there must be compliance with statutory formalities, because there cannot be rectification of a formally invalid agreement.²⁴ Thereafter, the party seeking rectification of the valid agreement must meet the traditional requirements of the remedy: he must prove that the parties at least shared a common intention which they intended to express in their written document, but which they failed to do by virtue of a mistake.²⁵ In *Intercontinental Exports (Pty) Ltd v Fowles*²⁶ the court held that factual allegations relevant to the second step may not be considered in the first step.²⁷ Although the court did not clarify this statement, its justification presumably lies in the fact that recourse to extrinsic evidence is generally excluded by both the parol evidence rule and statutory formalities when considering the formal validity of a document.²⁸

The adoption of the South African two-step approach is ascribed to the decision of the Appellate Division in *Magwaza v Heenan*²⁹ (“*Magwaza*”). Here the parties failed to describe with sufficient certainty the land which was the object of the contract of sale between them. The question for decision was whether the document could be rectified to present an accurate record of the parties' agreement in spite of the fact that, *ex facie* the document, it did not comply with statutory formalities.

Before reaching its conclusion, the court considered divergent opinions in both case law and academic commentary. On the one hand, there were *dicta* in earlier cases like

²³ *Benjamin v Gurewitz* 1973 1 SA 418 (A) 426C-D per van Blerk JA. See also *Weinerlein v Goch Buildings Ltd* 1925 AD 282 289 per De Villiers JA.

²⁴ *Republican Press (Pty) Ltd v Martin Murray Associates CC* 1996 2 SA 246 (N) 254E; *Intercontinental Exports (Pty) Ltd v Fowles* 1999 2 All SA 304 (A) para 10. See 5 3 below.

²⁵ See 5 4 below and eg *Meyer v Merchants' Trust Ltd* 1942 AD 244 253; *Lazarus v Gorfinkel* 1988 4 SA 123 (C) 131D; *Humphrys v Laser Transport Holdings Ltd* 1994 4 SA 388 (C) 395H.

²⁶ 1999 2 All SA 304 (A).

²⁷ Para 10.

²⁸ This was discussed in ch 4 (4 3 4) and will be discussed further in 5 3 2 2 below.

²⁹ 1979 2 SA 1019 (A).

*Dowdle's Estate v Dowdle*³⁰ ("Dowdle") and *Kourie v Bear*³¹ ("Kourie") to the effect that one could not rectify a document which did not comply with statutory formalities, because this would amount to investing a void transaction with validity. In the *Dowdle* case, this conclusion was thought to be implicit in *Weinerlein v Goch Buildings Ltd*³² ("Weinerlein").

On the other hand, there were cases like *Vogel NO v Volkersz*,³³ where Botha J expressed doubt as to whether *Weinerlein* actually supported the conclusion drawn in *Dowdle*. As pointed out by the judge, the court in *Weinerlein* was confronted with the question whether rectification of a formally valid agreement would be contrary to statutory formalities and not whether a court could rectify a formally invalid document in order to make it comply with statutory formalities.³⁴ There was therefore nothing in De Villiers JA's judgment in the *Weinerlein* case which compelled the court in *Dowdle* to come to the conclusion that formal invalidity precludes rectification.

Finally, the court in *Magwaza* considered academic commentary including that of De Wet, who pointed to the illogicality of requiring a document which *ex confesso* represents an inaccurate record of the parties' agreement first to comply with statutory requirements before it could be rectified.³⁵ De Wet does not explain this statement. Presumably, it is illogical because it requires a written agreement, which is by one or both parties' admission an incorrect record of their true agreement, to be formally correct before it can be substantively corrected. In other words,

³⁰ 1947 3 SA 340 (T) 354.

³¹ 1949 2 SA 567 (T) 572.

³² 1925 AD 282. See *Dowdle's Estate v Dowdle* 1947 3 SA 340 (T) 354.

³³ 1977 1 SA 537 (T) 557A. Although the discussion in the main text focuses on Botha J's comments on *Weinerlein v Goch Buildings Ltd* 1925 AD 282, the judge also held that a party could seek rectification of a clause inserted into an agreement subject to formalities solely in its favour, in spite of the fact that that clause was void for vagueness (548F-549A read with 557H). This conclusion is discussed in Kerr *The Law of Contract* 161 n 764; Lubbe & Murray *Contract* 234-235 n 3.

³⁴ 557B-D.

³⁵ J C de Wet & A H van Wyk *De Wet en Yeats Die Suid-Afrikaanse Kontraktereg en Handelsreg* 4 ed (1978) 286 n 55 (the statement is not repeated in the corresponding passage in J C De Wet & A H van Wyk *Die Suid-Afrikaanse Kontraktereg & Handelsreg* 1 5 ed (1992) 323 n 55).

“[t]o insist that [a faulty transcription] is nevertheless incapable of rectification unless it proves the validity of the underlying transaction is ... to treat as decisive of that issue a record which ex hypothesi is erroneous.”³⁶

In spite of this criticism of the necessity for *ex facie* compliance with statutory formalities, the court in *Magwaza* concluded that the position as stated in *Dowdle*, namely that an agreement subject to statutory formalities must first comply with those formalities before it can be rectified because one cannot rectify a nullity, was correct.³⁷ In any event, the court held, to ignore the first step would be “in theory subversive of the [functions of] statutory formalities, and in practice ... must inevitably prove emasculatory of them.”³⁸

In *Magwaza*, there are two interrelated justifications presented for requiring *ex facie* compliance with statutory formalities. The first is the notion that non-compliance with statutory formalities renders the agreement void and therefore precludes rectification. The second is the argument that rectification of a non-compliant agreement creates uncertainty and the possibility of perjured claims, and is therefore contrary to the intention underlying the imposition of statutory formalities. In what follows, these arguments supporting the first step will be considered. Thereafter, the second step, namely the requirements for a successful claim of rectification, will be discussed in greater detail.

5 3 The first step: no rectification of void agreements

5 3 1 Introduction

The following two examples are used to illustrate the theory underlying the requirement that an agreement must appear to be formally valid before it can be rectified. In the first example, the document records a sale of land. *Ex facie* the document, the description of the land is so deficient that it cannot “be identified on the ground by reference to the provisions of the contract”.³⁹ On the face of it, the document therefore appears to record a void agreement because it lacks one of the essential terms required to be in writing by the

³⁶ *Spiller v Lawrence* 1976 1 SA 307 (N) 311C.

³⁷ *Magwaza v Heenan* 1979 2 SA 1019 (A) 1028A-B.

³⁸ 1028B-C.

³⁹ *Clements v Simpson* 1971 3 SA 1 (A) 7F. See also ch 3 (3 3 3 1) in which the means to comply with this test is set out in detail.

Alienation of Land Act. In the second example, a document records the sale of shares. The document contains a term which amounts to the giving of financial assistance for the purchase of the shares, in contravention of the relevant company legislation.⁴⁰ *Ex facie* the document, this sale also appears to be void. However, in a claim for rectification, a court will rectify the document in the second example but not the first.

The reason for these different outcomes is explained in *Spiller v Lawrence* (“*Spiller*”):⁴¹

“The two situations are fundamentally different. In the [second example], when the question of validity relates to the substance of the transaction and not its form, nullity is an illusion produced by a document testifying falsely to what was agreed. In the [first example], ... the cause of nullity is indeed to be found in the transaction's form. When it is said to consist of a failure to observe the law's requirement that the agreement be reflected by a document with particular characteristics the document itself is necessarily decisive of the issue whether the stipulation has been met; for it has been only if this emerges from the document. Appearance and reality therefore coincide. Nullity, when the document shows it, is no illusion.”⁴²

Therefore, when a court is asked to rectify a document for which statutory formalities are not prescribed, a distinction can be drawn between the document recording the agreement and the underlying agreement itself. Provided the underlying agreement is valid, “it follows inevitably that at the heart of the matter lies, not a void transaction, but a valid transaction incorrectly documented [and] the particular effect of the mistake in the document is wrongly to give the impression of nullity.”⁴³ However, in the case of an agreement subject to formalities, there is no distinction between the underlying agreement and the document, because the prescribed formalities are constitutive in nature: the document and the obligation come into existence simultaneously. The document no longer serves simply as the evidence of the agreement; it *is* the agreement.⁴⁴ When such a document does not comply with formalities, no obligation is created and as a consequence there is nothing to rectify.⁴⁵ Hence the necessity for the first step.

⁴⁰ This example is taken from the facts of *Spiller v Lawrence* 1976 1 SA 307 (N).

⁴¹ 1976 1 SA 307 (N).

⁴² 312B-D.

⁴³ 311D.

⁴⁴ Van der Merwe et al *Contract* 157.

⁴⁵ This point is confirmed in *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd* 2001 4 SA 1315 (SCA) para 26, in which Nienaber JA states that “where compliance with the statutory formalities is a

South African courts consistently require *ex facie* compliance with statutory formalities as a prerequisite to a successful claim for rectification. One would expect uniformity in the courts' approach to such an apparently self-evident requirement, but a careful study of case law on the point reveals that uniformity here is itself an illusion. It will also become apparent that there are in fact two dimensions to the problem of *ex facie* compliance with statutory formalities. The first is whether a court adopts a strict or lenient approach to the question whether the document is formally valid. The second is whether the notion of *ex facie* compliance relates to formal validity only or whether it includes issues relating to substantive validity.

5 3 2 The two dimensions of the requirement of *ex facie* compliance

5 3 2 1 *A strict versus a lenient approach to formal validity*

5 3 2 1 1 *A strict approach*

A strict interpretation of the requirement of formal validity is represented by the majority judgment in *Republican Press (Pty) Ltd v Martin Murray Associates CC*⁴⁶ ("*Republican Press*"), the facts of which were briefly discussed in a previous chapter.⁴⁷ The plaintiff sought to rectify a deed of suretyship in which the name "Republican Press (Pty) Ltd" was erroneously inserted as both the principal debtor and the creditor. It was common cause that the parties had agreed on the identities of all the relevant parties, prior to reducing their agreement to writing.⁴⁸ Counsel for the plaintiff argued that there was *ex facie* compliance with the relevant formalities (albeit that two of the three parties identified shared the same name)⁴⁹ or alternatively, if there was doubt about whether the document complied with the relevant formalities, then the prevailing judicial trend was to interpret the

prerequisite for the actual formation of an agreement, a failure to comply means that nothing is constituted and consequently there is by definition nothing that can be rectified".

⁴⁶ 1996 2 SA 246 (N).

⁴⁷ See ch 3 (3 3 2 2).

⁴⁸ *Republican Press (Pty) Ltd v Martin Murray Associates CC* 1996 2 SA 246 (N) 256G-H.

⁴⁹ 251C.

document in such a manner as to render it formally valid, in order to proceed with rectification.⁵⁰

With regard to the first argument, counsel for the plaintiff suggested that there was nothing on the face of the document to suggest that it was formally invalid; this was not a situation where the name of one of the parties had been completely omitted for example. In support of his argument, he sought to draw an analogy with the situation where two of the parties to the suretyship were identified as the same natural person, but who were in fact father and son. In such a case, the document could not be presumed to be formally invalid.⁵¹ Hurt J, writing for the majority, responded to this argument by indicating that first, in a situation such as that, rectification would be unnecessary. If formal invalidity were pleaded, it could be met with the replication that the two parties were in fact related to each other.⁵² Secondly, extrinsic evidence would be admissible to identify these parties as father and son. According to the judge, such evidence would always be admissible in cases of doubt as to whether there were in fact three parties identified in the document.⁵³

However, because the court was confronted with a document which identified two of the three parties as “Republican Press (Pty) Ltd”, and because there cannot be two companies with the same name, there could be no doubt that the document was referring to the same party as both principal debtor and creditor and was for that reason formally invalid.⁵⁴

Furthermore, the court disagreed with counsel’s contention that in cases of doubt as to whether a document was formally valid, a court would adopt an interpretation which favoured validity rather than invalidity. First, according to the court, there were no cases where such a statement had been explicitly made.⁵⁵ Secondly, the decision in *Magwaza* was a clear indication that the policy considerations underlying the imposition of formalities took precedence over the equitable considerations underlying the remedy of rectification, in spite of the fact that formalities may not be the best way to promote these policy

⁵⁰ 251I.

⁵¹ 251B-D.

⁵² 251E-F.

⁵³ 251F-G.

⁵⁴ 251G-H.

⁵⁵ 251I-252A.

considerations and in spite of the fact that *ex facie* compliance with statutory formalities as a prerequisite to rectification could also lead to anomalous results.⁵⁶ Finally, where there seemed to be an implication that a benign approach should be adopted in determining whether there had been compliance with statutory formalities, as in *Litecor Voltex (Natal) (Pty) Ltd v Jason*,⁵⁷ this was either wrong or at best confusing.⁵⁸

In closing, Hurt J made the following remark:

“[A] strict approach to the test of whether the document ostensibly complies with the statute is [not], in practice, all that unfair to the parties. The creditor is invariably the party who stipulates for a suretyship undertaking as a condition for the giving, or prolonging, of terms of credit. He is the party who benefits from the undertaking by having an extra debtor, or debtors, against whom he can proceed in the event of default by the principal debtor. It is little enough to ask of him to ensure that, when the undertaking is executed, it has the correct names in the correct places and, as I understand the purport of the decisions of the Appellate Division, a creditor who omits this simple step may find that he has (to purloin an intriguing expression used by [G A] Mulligan KC [‘No Orchids for Misrepresentation?’] in 1951 SALJ [157] 161) to ‘dree his weird’.”⁵⁹

Although this appears to be an *obiter* remark, this justification for a strict approach confuses the first step – formal validity – with the requirements of the second step, namely the elements to be proved in order to succeed with a claim for rectification. More specifically, it appears as if the judge was resurrecting, perhaps indirectly, the notion that the party seeking rectification must prove that the mistake is reasonable.⁶⁰ There is no

⁵⁶ 253A-D, 255B-E.

⁵⁷ 1988 2 SA 78 (D).

⁵⁸ *Republican Press (Pty) Ltd v Martin Murray Associates CC* 1996 2 SA 246 (N) 253E-254I. *Litecor Voltex (Natal) (Pty) Ltd v Jason* 1988 2 SA 78 (D) is discussed in 5.3.2.2 below.

⁵⁹ 255E-G.

⁶⁰ See eg cases like *Van der Byl v Van der Byl & Co* 1899 16 SC 338 349 per De Villiers CJ; *Quinn v Goldschmidt* 1910 EDL 158 164; *Patel v Le Clus (Pty) Ltd* 1946 TPD 30 34; *Bushby v Guardian Assurance Co* 1915 WLD 65 71 and the statement by Kerr *The Law of Contract* 157-159:

“[T]he line of distinction [to determine which errors will be corrected] lies between, on the one hand, cases in which parties give the problem [of the recordal of an essential term] the consideration it requires and take care over the recording of their agreement but overlook an error of commission or omission; and, on the other hand, cases in which they give the problem little consideration or make no serious attempt to complete their contract in writing ... What is fatal is language so obscure, or an omission of such a nature,

reason to require that the mistake be reasonable, because both parties know what the true agreement is. Reasonableness in the context of dissensus and mistake is imposed in order to protect the party who relies on the agreement as it appears to be; in the context of rectification, both parties are usually aware of the fact that the ostensible agreement does not reflect their actual agreement and neither party, therefore, needs the additional indirect protection that the mistake should be reasonable.⁶¹

A similarly strict approach to formal validity is evident in the earlier case of *Brack v Citystate Townhouses (Pty) Ltd*⁶² (“*Brack*”). Here the parties had concluded a written agreement for the sale of land. The heading of the document indicated that the agreement had been entered into by the respondent as seller, represented by its duly authorised representative (identified by name in the heading), and the applicant as purchaser.⁶³ The concluding portion of the document provided spaces, above the typed words “Seller” and “Purchaser”, for the signatures of the parties as well as spaces for the signatures of witnesses. The document itself did not reflect a signature of the “Seller”, but did contain an illegible signature (said to be that of the seller’s representative) in the space for a witness to the seller’s signature. This same signature appeared as witness to the purchaser’s signature.⁶⁴

Counsel for the applicant argued that *ex facie* the document, it was uncertain whether there had been compliance with formal requirements. More specifically, this uncertainty was created by the fact that

“the space above the word ‘seller’ was left blank, coupled with the fact that the person designated in the heading of the document as the person who was to sign on behalf of the

that when the parties look at the document(s) before signing they should realise that the requirements of the statute in question have not been fulfilled.” (Footnotes omitted).

More recent cases have indicated that a reasonable mistake is not a requirement, including *Humphrys v Laser Transport Holdings Ltd* 1994 3 SA 388 (C) 399A-I; *Offit Enterprises (Pty) Ltd v Knysna Development Co (Pty) Ltd* 1987 4 SA 24 (C) 28F-G; *Van Aswegen v Fourie* 1964 3 SA 94 (O) 102B-C. See also B R Bamford “Rectification in Contract” (1963) 80 SALJ 528 533-534.

⁶¹ De Wet & Van Wyk *Kontraktereg* 1 29-30.

⁶² 1982 3 SA 364 (W).

⁶³ 365H.

⁶⁴ 365H-366C.

seller, ... signed next to the blank space and to the left of it, ostensibly, but inexplicably, as a witness to a non-existing signature, instead of in the obviously appropriate space to the right of where his signature appears, and above the word 'seller'.”⁶⁵

In view of the fact that there was doubt as to whether the document was formally valid or invalid, it was argued that extrinsic evidence was admissible to resolve that doubt.⁶⁶ On the facts, such evidence would have indicated that the representative for the respondent had intended to sign in the space designated for the “Seller” and that his failure to do so was in fact a mistake.⁶⁷

The court disagreed. It held that

“[i]f [the representative’s] evidence is accepted, it explains why his signature appears as that of a witness, and why there is a blank above the word 'Seller', but it goes no further than showing that a mistake had been made. It certainly does not show that the contract is valid, because [the representative] cannot by giving evidence transpose his signature on the document from where it actually appears under the words 'As witnesses' to the blank space above the word 'Seller', and so fill in the blank space, notionally but not physically, as it were ...”⁶⁸

and concluded:

“[T]he defect in the agreement is one that unquestionably proclaims *ex facie* the document that the statutory formalities have not been complied with. By no conceivable process of interpretation or construction can that defect be cured, for to transform [the representative’s] signature as a witness into a signature as seller would amount to nothing less than a reformation of the ostensibly inchoate agreement into a duly completed one. The applicant cannot achieve his object without the rectification of the document, but the document is a nullity on the face of it, and accordingly the applicant is precluded from being afforded relief”.⁶⁹

⁶⁵ 368A-B.

⁶⁶ 368C-D.

⁶⁷ 366H.

⁶⁸ 369A-B.

⁶⁹ 369F-G.

While the *Brack* and *Republican Press* cases appear to differ in the role which they ascribe to extrinsic evidence in the determination of formal validity,⁷⁰ both demonstrate a strict approach to the first step in the rectification of agreements subject to formalities, because neither appears to approve of the argument that in cases of doubt, a court should adopt an approach which favours the validity, rather than invalidity, of such an agreement.⁷¹

5.3.2.1.2 A lenient approach

The second, more lenient approach to the first step is represented by cases like *Chisnall and Chisnall v Sturgeon and Sturgeon*⁷² (“*Chisnall*”), *Papenfus v Steyn*⁷³ (“*Papenfus*”) and ultimately, *Intercontinental Exports (Pty) Ltd v Fowles*⁷⁴ (“*Intercontinental Exports*”). In *Chisnall*, the plaintiffs were the joint sellers of the property, while the defendants were joint purchasers. The second plaintiff’s signature was described as that of the “seller’s spouse” (rather than of co-seller) while that of the second defendant was described as being given to assist her husband (rather than of the co-purchaser).⁷⁵ Because these parties had ostensibly signed in the wrong capacities, the defendants argued that they could not have been said to have assented to the terms of the agreement as (co-)purchaser and (co-)seller respectively and the agreement was formally invalid.⁷⁶

The court held that the correct approach was not to limit itself to that part of the document which contained the parties’ signatures, but to look at the document as a whole in order to determine whether the parties had intended (also) to assent to the terms of the agreement as co-seller and co-purchaser.⁷⁷ In response to counsel’s contention that the *Brack* case

⁷⁰ In *Brack v Citystate Townhouses (Pty) Ltd* 1982 3 SA 364 (W) 368H-369C the court rejected the possibility that extrinsic evidence could be used to determine the formal validity of a written agreement, even in cases of doubt. In *Republican Press (Pty) Ltd v Martin Murray Associates CC* 1996 2 SA 246 (N) 251F-G, Hurt J stated that such evidence should be admissible “*ante omnia* in any situation where there is doubt as to whether the document [is formally valid]”.

⁷¹ De Wet & Van Wyk *Kontraktereg* 1 323 n 55 describe *Brack v Citystate Townhouses (Pty) Ltd* 1982 3 SA 364 (W) as adopting “‘n uiters formalistiese benadering”.

⁷² 1993 2 SA 642 (W).

⁷³ 1969 1 SA 92 (T).

⁷⁴ 1999 2 All SA 304 (A).

⁷⁵ *Chisnall and Chisnall v Sturgeon and Sturgeon* 1993 2 SA 642 (W) 644G-I.

⁷⁶ 644E-G.

⁷⁷ 646B-C.

was authority for the fact that a party who has signed in one capacity cannot be taken as having signed (also or instead of) in another,⁷⁸ the court disagreed and pointed out that there, the court had come to its conclusion on the basis that

“leaving blank the space where the seller would be expected to sign proclaimed that no one has signed as seller. This *indiciu*, 'all the more so' because signature took place 'as witness', was regarded as so dominant or even exclusive that it precluded the signature from (also or instead) being a token of execution of the seller.”⁷⁹

The second sentence of the quotation arguably amounts to a misreading of the *Brack* judgment. There is no indication in that case that the court considered the possibility that a party can sign in two capacities. It was not convinced by the argument that there was a certain degree of ambiguity due to the fact that the representative was indicated as acting on behalf of the seller, but signed in the space designated for a witness.⁸⁰ According to the court, the problem was not that the document could give rise to two possible conclusions, one leading to validity and the other not, but that there was an overall failure to comply with statutory formalities because ostensibly, the deed did not reflect the signature of the seller or someone authorised to act on his behalf.

By contrast, the court in *Chisnall* not only recognised the possibility that a party could sign in more than one capacity, but it also realised that the document was ambiguous in the sense that the second plaintiff and second defendant were described as seller and purchaser respectively in the body of the contract, but signed in other capacities at the end of it. As the court notes, in cases of doubt, it should favour an interpretation which renders the agreement valid rather than invalid.⁸¹

A similar approach underlies *Papenfus* where the plaintiff/purchaser signed in the space for the defendant/seller's signature and *vice versa*.⁸² Elsewhere in the document, the plaintiff was clearly identified as the purchaser.⁸³ *Ex facie* the document, a certain degree

⁷⁸ 645I-646A.

⁷⁹ 646D-E.

⁸⁰ *Brack v Citystate Townhouses (Pty) Ltd* 1982 3 SA 364 (W) 368H.

⁸¹ *Chisnall and Chisnall v Sturgeon and Sturgeon* 1993 2 SA 642 (W) 647D.

⁸² *Papenfus v Steyn* 1969 1 SA 92 (T) 94D.

⁸³ 97A.

of ambiguity or uncertainty therefore existed as to the capacity in which either party had signed. According to the *Brack* judgment, the facts in *Papenfus* could be distinguished on the basis that both a purchaser and a seller had signed the document, albeit incorrectly. In other words, *ex facie* the document, there was compliance with statutory formalities.⁸⁴ The problem in *Papenfus* was one of interpretation, because the document was ambiguous.⁸⁵ Again, this is a tenuous distinction to draw: the document in *Brack* also created ambiguity, because it identified the signatory as acting on behalf of the seller but reflected his signature in the space reserved for a witness.

As discussed previously,⁸⁶ in *Intercontinental Exports*, a suretyship identified the principal debtor as “Mr Frank Fowles” while the surety was described as “Frank Turner Fowles”.⁸⁷ The court decided that although the names reflected as principal debtor and surety were similar, they were not identical and, *ex facie* the document, did not necessarily refer to the same person. Even if the two names were to be identical, it did not follow as a matter of course that they referred to the same person.⁸⁸ The suretyship was therefore capable of being construed *ex facie* the document as reflecting a creditor, principal debtor and surety and was held to comply with the statutory formalities.

The reason why *Republican Press* and *Brack* are characterised as adopting a strict approach while that of *Intercontinental Exports*, *Chisnall* and *Papenfus* is regarded as more lenient is not because the reasoning differs greatly: they all adopt an objective approach to determining whether, *ex facie* the document, there is compliance with statutory formalities.⁸⁹ The differences lie elsewhere.

⁸⁴ *Brack v Citystate Townhouses (Pty) Ltd* 1982 3 SA 364 (W) 369C-D.

⁸⁵ 369E.

⁸⁶ Ch 3 (3 3 2 2).

⁸⁷ *Intercontinental Exports (Pty) Ltd v Fowles* 1999 2 All SA 304 (A) para 15.

⁸⁸ *Intercontinental Exports (Pty) Ltd v Fowles* 1999 2 All SA 304 (A) para 17. See also *Inventive Labour Structuring (Pty) Ltd v Corfe* 2006 3 SA 107 (SCA).

⁸⁹ See N Grové “*Republican Press (Pty) Ltd v Martin Murray Associates CC and Others*” 1996 DJ 401 404; R le Roux “A Creditor Left To ‘Dree His Weird’” (1996) 4 JBL 157 158.

First, *Intercontinental Exports*, for example, recognises that formalities can be an “unnecessary stumbling-block”⁹⁰ to rectification and that a court should thus adopt an interpretation consistent with validity where this is reasonably possible. This seems to be a tempering of the approach adopted in *Republican Press* and *Brack*, where there was an outright rejection of the argument that in cases of doubt, a court should adopt an interpretation which favours formal validity rather than invalidity.

Secondly, the leniency of the approach is reflected in the role it ascribes to extrinsic evidence in determining formal validity. It was noted above that in *Republican Press*, Hurt J was confronted with the argument that a suretyship which identified two of the three parties as the same natural person could not be regarded as formally invalid for that reason alone. Hurt J’s response, in full, was as follows:

“It seems to me that there are two conclusive answers to this proposition. The first is that if there are indeed two parties to the suretyship undertaking who have identical names, there will be no need for a rectification of the document and those parties would presumably be cited, and separately identified, in any proceedings in which the document and the question of its enforceability may come before the Court. If it were pleaded, in such a case, that the document was invalid for non-compliance with s 6 [of the General Law Amendment Act], that plea could be disposed of by a replication to the effect that the identical names referred to two different juristic *personae*. The second is that evidence would be admissible for the limited purpose of identification of the parties to the undertaking, provided always that the evidence does not encroach into the prohibited territory demarcated by the parol evidence rule ... It seems to me that such evidence would be admissible *ante omnia* in any situation where there is doubt as to whether the document refers to three separate parties to the contract of suretyship.”⁹¹

With the last statement in the quotation, the judge appears to imply that extrinsic evidence would always be admissible as a matter of course in order to determine whether an agreement was formally invalid. For example, if the suretyship identified both the debtor and surety as natural person “X”, extrinsic evidence would be admissible to determine whether “X” the debtor and “X” the surety were two different persons (in which case the

⁹⁰ *Intercontinental Exports (Pty) Ltd v Fowles* 1999 2 All SA 304 (A) para 11. See also *Inventive Labour Structuring (Pty) Ltd v Corfe* 2006 3 SA 107 (SCA) para 11.

⁹¹ *Republican Press (Pty) Ltd v Martin Murray Associates CC* 1996 2 SA 246 (N) 251D-G.

suretyship would be formally valid) or one and the same person (in which case the agreement would be formally invalid).

The court in *Intercontinental Exports* reacted to Hurt J's exposition as follows:

"With regard to the first answer, it seems to proceed from the premise that the suretyship undertaking is formally valid. With regard to the second, the envisaged evidence would be admissible not to establish the document's formal validity, but to give effect to an otherwise valid suretyship. It would, for example, permit extrinsic evidence to be led to identify the actual creditor, principal debtor or surety, as the case may be, from among a group of such named in the written document ... To that extent the quoted passage is not inconsistent with the views expressed above. If by the last sentence is meant that evidence could be led to show, contrary to what appears *ex facie* the document, that a suretyship undertaking lacks formal validity (eg to show that two of the parties are the same) I would respectfully disagree."⁹²

In other words, the court draws a distinction between the use of extrinsic evidence to apply the terms of a formally valid agreement to the facts and the use of extrinsic evidence to prove that an agreement is formally invalid, in spite of the appearance of validity *ex facie* the document. To use the example given above: extrinsic evidence is permitted to show that debtor "X" and surety "X" are in fact father and son. This admission of extrinsic evidence proceeds from the prior conclusion that the agreement is formally valid, which in turn is based on the fact that the two parties are natural persons: a reasonable interpretation in favour of formal validity assumes that the identified parties are in fact two different people. By contrast, extrinsic evidence would not be admissible if it were tendered for the purpose of showing that contrary to this assumption, debtor "X" and surety "X" are in fact one and the same person in reality and that the agreement is therefore formally invalid, since such evidence would contradict what appears *ex facie* the document to be a formally valid agreement.⁹³

⁹² *Intercontinental Exports (Pty) Ltd v Fowles* 1999 2 All SA 304 (A) para 20.

⁹³ It should be pointed out that this statement is confined to extrinsic evidence tendered for the purpose of proving formal invalidity and which contradicts what appears to be a formally valid agreement. It is a different matter if evidence was tendered to prove that debtor "X" and surety "X" are the same person because there was no agreement upon the principal debtor for whom the surety accepted liability. This evidence would show that there was a lack of consensus on one of the basic elements of a suretyship, which is always admissible (see ch 4 (4 3 4)).

Thus, *Intercontinental Exports* represents a more lenient approach also because it confines itself to determining formal validity by examining the document alone. If, on the face of it, it appears to comply with statutory requirements, then a court must conclude that the agreement is formally valid, irrespective of whether there may be extrinsic evidence to prove the contrary.⁹⁴

The more lenient approach represented by *Intercontinental Exports* was recently confirmed in the Supreme Court of Appeal decision in *Van Oudtshoorn v Investec Bank Ltd*⁹⁵ (“*Van Oudtshoorn*”). The appellant was identified as the surety, and the deed of suretyship stated that it was signed by the surety. However, the actual signature on the document belonged to another party, without any qualification that that party was acting as a representative of the surety.⁹⁶ The court confirmed that formal validity had to be determined by an examination of the document alone,⁹⁷ and that in cases of doubt, a written agreement should be interpreted as being formally valid rather than invalid.⁹⁸ According to the court, the document could be interpreted in two ways: the first, which would render the agreement invalid, was that the document was signed by mistake; the second, leading to a conclusion of validity, was that the document had been signed by the surety’s representative.⁹⁹ It was concluded that in the face of two possible constructions, one of which leads to the validity of the agreement, it is this construction which should be adopted.¹⁰⁰ The deed was therefore held to be formally valid on the basis that it had been signed by the surety’s representative.

The same approach to the role of extrinsic evidence in the determination of formal validity adopted in *Intercontinental Exports* and *Van Oudtshoorn* is also evident in cases dealing

⁹⁴ This is also illustrated in *Inventive Labour Structuring (Pty) Ltd v Corfe* 2006 3 SA 107 (SCA) paras 7-8, 12 where the principal debtor and surety were identified as the same natural person. The court held that the document was formally valid, despite the fact that there was only one “Dennis Corfe” in reality.

⁹⁵ (558/10) [2011] ZASCA 205 (25-11-2011).

⁹⁶ Para 35.

⁹⁷ See also *Swanepoel v Nameng* 2010 3 SA 124 (SCA) para 16.

⁹⁸ *Van Oudtshoorn v Investec Bank Ltd* (558/10) [2011] ZASCA 205 (25-11-2011) para 37.

⁹⁹ Para 38.

¹⁰⁰ Para 38.

with written agreements from which other material terms have been omitted (but where, on the face of these documents, there is no evidence of the omission¹⁰¹).

For example, in *Standard Bank of SA Ltd v Cohen (1)*¹⁰² (“*Cohen (1)*”) material terms had been omitted from certain suretyship agreements. As discussed previously,¹⁰³ these terms were first, that the plaintiff would not advance credit to the principal debtor in excess of the amount guaranteed by the defendant and secondly, that no credit would be advanced until the debtor had ceded its book debts to the plaintiff as security.¹⁰⁴ The court held that

“[w]here the parties to a suretyship agreement have reduced their agreement to writing and the writing *prima facie* complies with the requirements of s 6 of [the General Law Amendment Act], the surety cannot, in an action by the creditor based on the suretyship agreement, rely on the fact that material terms orally agreed upon prior to or contemporaneously with the execution of the written agreement have not been included in the written document in order to have the written agreement invalidated for non-compliance with the requirements of that section. The only avenue open to the surety in such a case is to apply for rectification of the written agreement. Until rectification takes place or in the absence thereof, the written agreements stands and such terms as may have been orally agreed upon but excluded from the document are irrelevant.”¹⁰⁵

Also in *Brits v Van Heerden*,¹⁰⁶ (“*Brits*”) the court permitted the rectification of a deed of alienation where the parties omitted a term that the defendant would cede an insurance policy as part of the purchase price for the property. Although not explicitly referred to by the court, this term was, at the very least, material to the parties' agreement.¹⁰⁷

While all these cases represent a more lenient approach to the determination of formal validity and compliance with the first step, they also appear to contradict certain other

¹⁰¹ In other words, these are not cases where the omission is clearly indicated by a blank space. In those cases extrinsic evidence is admissible in order to determine why there is a blank space in the document – see *Johnston v Leal* 1980 3 SA 927 (A) and the discussion in ch 4 (4 3 2).

¹⁰² 1993 3 SA 846 (SE).

¹⁰³ See ch 4 (4 3 4).

¹⁰⁴ *Standard Bank of SA Ltd v Cohen (1)* 1993 3 SA 846 (SE) 847F.

¹⁰⁵ *Standard Bank of SA Ltd v Cohen (1)* 1993 3 SA 846 (SE) 853B-D. Rectification of the agreements was duly sought in the sequel to this case, *Standard Bank of SA Ltd v Cohen (2)* 1993 3 SA 854 (SE).

¹⁰⁶ 2001 3 SA 257 (C).

¹⁰⁷ See ch 3 (3 2 2).

decisions. For example, it has been held that all the material terms of an agreement subject to statutory formalities must be reduced to writing in order for it to be valid.¹⁰⁸ And in *Philmatt (Pty) Ltd v Mosselbank Developments CC*¹⁰⁹ (“*Philmatt*”) the court held that extrinsic evidence of an omitted material term is always permissible to show that an agreement subject to formalities is void.¹¹⁰

The contradiction between the rule that all the material terms of an agreement subject to formalities must be reduced to writing and the cases allowing rectification of an agreement from which such a term has been omitted is more apparent than real. For example, in *Johnston v Leal*¹¹¹ (“*Johnston*”) the omission of what could have been a material term was apparent *ex facie* the written agreement (in the form of a blank space). However, De Wet notes that

“[v]ir sover ... te kenne gegee word dat die vermeende kontrak nietig is omdat ‘n wesenlike beding van ‘n voorafgaande mondelinge afspraak nie opgeneem is in die skriftelike stuk nie, kan ek nie daarmee saamstem nie. Die beding is daarmee heen maar die kontrak in die skriftelike stuk bly bestaan.”¹¹²

Provided a “deugdelike interpretasie”¹¹³ of the written document reveals what appears to be a complete contract, as was the case in both *Cohen (1)* and *Brits*, that contract will not be void and the omitted term is simply ignored. The only way to enforce omitted material terms would be to seek rectification of the written document so that the terms can be included in the contract.

A more fundamental and seemingly irreconcilable discrepancy is that which exists between cases like *Cohen (1)* and *Brits* on the one hand, and the conclusion drawn by the Supreme Court of Appeal in *Philmatt*. It has already been noted that the court held that evidence of an omitted material term is always permissible when it is tendered to show

¹⁰⁸ See eg *Stalwo (Pty) Ltd v Wary Holdings (Pty)* 2008 1 SA 654 (SCA) para 7 and the discussion in ch 3 (3 2 2).

¹⁰⁹ 1996 2 SA 15 (A).

¹¹⁰ 25F-G.

¹¹¹ 1980 3 SA 927 (A).

¹¹² De Wet & Van Wyk *Kontraktereg* 1 324 n 56.

¹¹³ 324 n 56.

that the written agreement did not contain that term and is for that reason invalid.¹¹⁴ This is in spite of the fact that the document looks complete on the face of it. However, when it comes to determining whether a document is formally valid for the purposes of rectifying it, the same evidence is disregarded for the purposes of determining whether there has been compliance with the first step. The court did not consider the impact of its decision in the context of rectification, nor did it consider cases which had held the opposite.¹¹⁵ As pointed out previously, it relied on the statement in *Johnston* to the effect that extrinsic evidence to prove non-compliance with a statute is always admissible. For this, *Johnston* in turn relied on an English case¹¹⁶ which does not necessarily support the conclusion drawn in either *Johnston* or *Philmatt*. The implications of the *Philmatt* decision will be considered further in 5 3 3 below.

5 3 2 2 *Formal versus substantive invalidity*

Irrespective of whether a court adopts a strict or lenient approach to the determination of formal validity and *ex facie* compliance with statutory formalities, it is a separate question whether such a court would rectify the document if the agreement it embodies is substantively, as opposed to formally, invalid. As discussed in the previous chapter,¹¹⁷ formal validity relates to defects in the form of the transaction. Substantive invalidity relates to the failure to comply with other requirements for contractual validity, like legality, possibility and certainty of performance. As will become apparent below, South African courts limit the ambit of the first step so that only formal invalidity precludes the rectification of an agreement subject to formalities. Ostensible substantive invalidity is therefore not an obstacle to a claim for rectification.

¹¹⁴ See ch 4 (4 3 4).

¹¹⁵ In fairness, it should be pointed out that the subsequent case of *Intercontinental Exports (Pty) Ltd v Fowles* 1999 2 All SA 304 (A) para 20 also made no reference to the decision in *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 2 SA 15 (A) when it concluded that extrinsic evidence is irrelevant when it comes to determining formal validity for the purposes of compliance with the first step.

¹¹⁶ *Campbell Discount Co Ltd v Gall* [1961] 1 QB 431.

¹¹⁷ Ch 4 (4 3 4).

The origin of the distinction between these different “types” of invalidity is attributed to *Spiller v Lawrence*,¹¹⁸ although there the court was concerned with distinguishing between the rectification of agreements which are not subject to statutory formalities and those which are. Didcott J was required to consider whether a written agreement for the sale of shares, which included a term which amounted to the giving of financial assistance, could be rectified in spite of the fact that the document, on its face, appeared to record an invalid transaction. In concluding that it could, the judge stated that in the case of agreements not subject to statutory formalities, “nullity is an illusion produced by a document testifying falsely to what was agreed.”¹¹⁹ In such a case, a court may consider the parties’ actual agreement and where this is valid, rectify the document accordingly. However, in the case of agreements which are required to comply with formalities, “the cause of nullity is indeed to be found in the transaction’s form ... [and] the document itself is necessarily decisive of the issue whether the [formal requirements have] been met”.¹²⁰ As discussed above,¹²¹ where formalities are constitutive, a court may not consider the parties’ actual, underlying agreement, but is confined to determining whether the document itself represents a valid agreement. In other words, where statutory formalities are prescribed upon pain of nullity for non-compliance, “[a]pppearance and reality coincide”.¹²²

Although the distinction in *Spiller* focused on the difference between the rectification of agreements not subject to formalities and those which are, this distinction has also been used to limit the ambit of the first step in the rectification of agreements subject to formalities. The relevance of the distinction is as follows: where an agreement subject to formalities is formally invalid it may not be rectified, in spite of the fact that the parties may have a valid underlying agreement. However, if an agreement complies with the relevant statutory formalities, but appears to be void for some other reason, then a court may consider the parties’ underlying agreement in order to determine whether this is in fact valid and if so, rectify the apparently (substantively) invalid written agreement.

¹¹⁸ 1976 1 SA 307 (N). See *Litecor Voltex (Natal) (Pty) Ltd v Jason* 1988 2 SA 78 (D) 82G ff; *Headerman (Vryburg) (Pty) Ltd v Ping Bai* 1997 3 SA 1004 (SCA) 1010D-H; Van der Merwe et al *Contract* 157 n 223.

¹¹⁹ *Spiller v Lawrence* 1976 1 SA 307 (N) 312B.

¹²⁰ 312C-D.

¹²¹ 5 3 1.

¹²² *Spiller v Lawrence* 1976 1 SA 307 (N) 312D.

An example of this is found in *Litecor Voltex (Natal) (Pty) Ltd v Jason*¹²³ (“*Litecor Voltex*”) where, *ex facie* the suretyship agreement, it seemed that the defendant had acted on behalf of the debtor company. Throughout the document the defendant was referred to only as representative of the debtor company.¹²⁴ According to the court, his unqualified signature as surety did not change the fact that he had signed in his representative capacity,¹²⁵ with the effect that the principal debtor was standing surety for its own debt. On one view of the facts and in the light of decisions like *Magwaza* and *Spiller*, the document should not have been capable of rectification because it did not comply with statutory formalities. However, the very opposite was held by Didcott J, the same judge who delivered judgment in the *Spiller* case.

He held that the document he was being asked to rectify did not fall within the ambit of the rule set out in *Magwaza*, *Dowdle* and *Kourie* to the effect that “[one] cannot by rectification invest a document which is on the face of it null and void with legal force”.¹²⁶ According to Didcott J, the difference between the document he was being asked to rectify and those before the courts in *Magwaza*, *Dowdle* and *Kourie* was that in the latter cases, the descriptions of the land sold were too uncertain to constitute sufficient records of one of the essential terms of a contract of sale of land.¹²⁷ The rule laid down in these cases could not be said to apply to all contracts which were required to be in writing and which appeared to be void *ex facie* the document, but only to those which were void because they failed to comply with the relevant formal requirements.¹²⁸ The judge held further that the distinction drawn for the purposes of rectification in the *Spiller* case – between agreements which are not subject to formalities and those which are – was only relevant when a court was faced with a claim for rectification of a document which failed to meet formal requirements.¹²⁹ According to Didcott J, the document that he was being asked to rectify

¹²³ 1988 2 SA 78 (D).

¹²⁴ 79G.

¹²⁵ 79G.

¹²⁶ *Dowdle's Estate v Dowdle* 1947 3 SA 340 (T) 354.

¹²⁷ *Litecor Voltex (Natal) (Pty) Ltd v Jason* 1988 2 SA 78 (D) 82C-D.

¹²⁸ 82E-F.

¹²⁹ 83C-D.

“met all the formal requirements for a suretyship. [But it] showed a fault of another sort. And it showed that wrongly. The actual agreement, the agreement intended all along, had none. Rectification was thus in order.”¹³⁰

It is difficult to determine the true import of the *Litecor Voltex* decision. According to the court's own interpretation of the deed of suretyship, the surety had not signed in his personal capacity, but as representative of the debtor company. Therefore, it would appear that the document was *formally* invalid, since it failed to identify three distinct parties as creditor, debtor and surety.¹³¹ On this interpretation, no distinction should have been drawn between the documents in *Magwaza*, *Dowdle* and *Kourie* on the one hand and the document in *Litecor Voltex* on the other, because they all failed to identify an essential term of the agreement.

However, *Litecor Voltex* has also been interpreted as an example where the document is formally valid, but appears to be substantively invalid.¹³² Even though the surety signed the document in his representative capacity, three separate names nevertheless appeared *ex facie* the document. Such an interpretation would explain Didcott J's statement that the document “met all the formal requirements for a suretyship” despite the fact that the surety had signed in the incorrect capacity. Such an interpretation would also explain how Didcott J found support for his reasoning in the *Spiller* case. According to the judge,

¹³⁰ 83D-E.

¹³¹ See also Van der Merwe et al *Contract* 158 n 226; *Republican Press (Pty) Ltd v Martin Murray Associates* CC 1996 2 SA 246 (N) 254A-D, where Hurt J was of the opinion that on one interpretation at least, the document in *Litecor Voltex (Natal) (Pty) Ltd v Jason* 1988 2 SA 78 (D) was formally invalid.

¹³² G F Lubbe & C Murray *Farlam & Hathaway Contract - Cases, Materials and Commentary* 3 ed (1988) 235 n 4:

“[*Litecor Voltex*] extends the reasoning in [*Spiller*] to contracts governed by statutory formalities. A mistake in the expression of the parties creating the impression of substantial [ie substantive] invalidity may be rectified provided that the document on the face of it complies with the statutory requirements.”

See also *Nuform Formwork and Scaffolding (Pty) Ltd v Natscaff* CC 2002 4 All SA 575 (D) 581; *Republican Press (Pty) Ltd v Martin Murray Associates* CC 1996 2 SA 246 (N) 254H; *Headerman (Vryburg) (Pty) Ltd v Ping Bai* 1997 3 SA 1004 (SCA) 1010G.

“[t]he distinction drawn [in *Spiller*] for the purposes of rectification between contracts governed by formal requirements and the rest free from such mattered ... only when those on which they called did not duly answer them.”¹³³

This is a somewhat ingenious argument. The *Spiller* case was not concerned with the rectification of an agreement subject to formalities, but sought rather to indicate why a written agreement not subject to formalities but which appeared to be void could be rectified, whereas an agreement for which writing is constitutive could not be so rectified. In the former, the writing is not constitutive and a distinction can be drawn between the written record of the agreement and the agreement itself. Such a distinction cannot be drawn in cases where formalities are prescribed upon pain of nullity. However, in *Litecor Voltex* Didcott J applies this reasoning to agreements subject to formalities by distinguishing between instances where such an agreement does not comply with formal requirements (and therefore cannot be rectified) and an agreement which does comply but appears to be invalid for some other reason (in which case a court may consider the parties' underlying agreement). In other words, the judge assumed that in the event of formal invalidity, the document is the sole embodiment of the parties' agreement and that no distinction could be drawn between the recordal and that agreement. However, when the document recording the agreement complied with the relevant formal requirements but appeared to be substantively invalid, then a distinction could be drawn between the document and the underlying agreement.

Such an approach is of course inconsistent with the theory underlying the imposition of the first step in the rectification of agreements subject to formalities. The document constitutes the embodiment of the parties' agreement and it is surely the document which must be considered to determine whether the agreement complies with both formal and substantive requirements. If the document is the sole manifestation of the parties' agreement and bearing in mind the rule that a void agreement cannot be rectified, then both substantive and formal invalidity should preclude rectification. As Van der Merwe and others have pointed out,

¹³³ *Litecor Voltex (Natal) (Pty) Ltd v Jason* 1988 2 SA 78 (D) 83C-D. To clarify: the distinction is only important where contracts subject to formalities do not comply with those formalities.

"[i]n a case governed by statutory formalities it is arguable that the legal act is fully identified with its documentary manifestation. As a matter of logic, it might therefore be contended that the proper analysis is, in the words of Didcott J in the *Spiller* case, that 'appearance and reality coincide ... Nullity, when the document shows it, is no illusion', and that rectification ought to be excluded."¹³⁴

Nevertheless, the effect of the *Litecor Voltex* decision is to limit the ambit of the first step so that it precludes only the rectification of a document which does not appear to be formally valid; in the case of (mere) substantive invalidity *ex facie* the document, it seems as if a court is entitled to have regard to the parties' "actual" agreement.

This limitation of the ambit of first step is also apparent in cases where there is no doubt whatsoever that statutory formalities have been properly complied with, but where the document appears to reflect a substantively invalid agreement.

In *Headerman (Vryburg) (Pty) Ltd v Ping Bai*¹³⁵ ("*Headerman*") the court ordered rectification of a deed of alienation which complied with statutory formalities but which, *ex facie* the document, appeared to relate to the sale of erven in an unproclaimed township. Such a sale was prohibited by certain ordinances and the failure to heed this prohibition rendered the sale void.¹³⁶ However, as in *Litecor Voltex*, the Supreme Court of Appeal interpreted the *Spiller* distinction as prohibiting the rectification of agreements subject to formalities only in cases where the document fails to identify an essential term and is therefore formally invalid.¹³⁷ Where, as here, the document indicated compliance with statutory formalities but had the appearance of substantive invalidity, the court was entitled to consider the parties' underlying agreement (which was not invalid) and to rectify the document accordingly, by inserting the correct description of the land sold.

Van der Merwe and others cite *Engelbrecht v Nel*¹³⁸ ("*Engelbrecht*") as an example of a judgment where the apparent substantive invalidity *ex facie* the document precluded its

¹³⁴ *Contract* 158.

¹³⁵ 1997 3 SA 1004 (SCA).

¹³⁶ 1010B.

¹³⁷ 1010D-H.

¹³⁸ 1991 2 SA 549 (W).

rectification, thus contradicting the *Headerman* decision.¹³⁹ In the *Engelbrecht* case, the parties had concluded a written agreement for the sale of land. In addition to indicating the deposit which had to be paid, and the amount of monthly instalments, the document originally indicated that a further “R2500 per month [would be paid] which shall be capital and interest at 18% on a reducing balance per month”.¹⁴⁰ The amount of R2500 was subsequently deleted without the insertion of a new amount as replacement, and the rate of interest was replaced by the phrase “bank overdraft rate”.¹⁴¹

The court held that the method of payment is a material term of the agreement and that it had not been reduced to writing with sufficient certainty.¹⁴² The same argument applied to the amended method of calculation of the interest rate.¹⁴³ As a result, the agreement was void and could not be rectified.

It is difficult to determine the true basis for the court’s decision that the agreement could not be rectified. On the one hand, and as indicated in the previous paragraph, the court suggested that the agreement, or at least certain terms thereof, was void for vagueness. If certainty of performance is characterised as a substantive, rather than formal, requirement for validity, then the *Engelbrecht* case does appear to contradict the conclusion in *Headerman*. However, the prevailing judicial tendency, rightly or wrongly, characterises the requirement that the terms of an agreement subject to formalities should be reasonably ascertainable as a formal requirement, rather than a general contractual principle. Where a material term of the parties’ agreement has not been reduced to writing in a manner which renders it sufficiently ascertainable, the written agreement is treated as formally, rather than substantively, invalid.¹⁴⁴ This appears to be the reasoning underlying the following statement in *Engelbrecht*:

¹³⁹ *Contract* 158.

¹⁴⁰ *Engelbrecht v Nel* 1991 2 SA 549 (W) 550F-G.

¹⁴¹ 550G.

¹⁴² 552A.

¹⁴³ 552J-553A.

¹⁴⁴ See also eg *Hartland Implemente (Edms) Bpk v Enal Eiendomme* 2002 3 SA 653 (NC); *Thathiah v Kahn* NO 1982 3 SA 370 (D); *Magwaza v Heenan* 1979 2 SA 1019 (A); *Patel v Adam* 1977 2 SA 653 (A); *Vogel NO v Volkersz* 1977 1 SA 537 (T).

“The principle enunciated in a number of cases and confirmed in *Magwaza v Heenan* 1979 (2) SA 1019 (A) at 1024F - 1029B is that there can be no rectification of a sale of immovable property unless, *ex facie* the deed of sale, it complies with the requirements of the relevant statute. [Counsel for the defendant] tried to counter this argument by suggesting that the method of payment was not one of the *essentialia* of the agreement in question, in which event the agreement was not a nullity and could be rectified ... [T]here is no substance in this submission.”¹⁴⁵

A more definitive statement to the effect that the failure to record a term setting out the method of payment with reasonable certainty results in formal invalidity can be found in *Hartland Implemente (Edms) Bpk v Enal Eiendomme*.¹⁴⁶

“Toegepas op die onderhawige saak sal dit meebring dat die koopprys sowel as die wyse van betaling daarvan, in die skriftelike dokument waarin die vervreemdingsakte vervat is, bepaal en behoorlik omskryf moet wees, of dat ‘n formule daaruit blyk waarkragtens dit met redelike sekerheid objektief bepaal kan word sonder ‘n verwysing na getuienis van die mondelinge consensus tussen die partye. By gebreke daaraan sal die kontrak ongeldig en onafdwingbaar wees vanweë nie-nakoming van die bepalings van opskrifstelling soos vereis deur die gemelde art 2 van die Wet op Vervreemding van Grond.”¹⁴⁷

Both the lenient approach to formal invalidity and the judicial tendency to rectify agreements subject to formalities where they appear to be substantively invalid only, represent attempts to navigate the tension between giving effect to the policy considerations underlying statutory formalities on the one hand, and the need to do justice on the other. This is illustrated in *Papenfus v Steyn*.¹⁴⁸

“Die Howe dring aan op die noulettende nakoming van [statutêre formaliteite], maar terselfdertyd waak ons Howe daarteen dat die [formele vereistes] so uitgelê en toegepas word dat die ongerymdhede waarteen die [vereistes] gemik is juis deur die uitleg en toepassing daarvan aangemoedig of bevorder word.”¹⁴⁹

¹⁴⁵ *Engelbrecht v Nel* 1991 2 SA 549 (W) 552C-D. Counsel for the defendant was correct on one aspect at least: the method of payment is not one of the *essentialia* of a sale of land, but rather constitutes one of the substantive *incidentalia* of the agreement, provided the parties have agreed on such a term and have incorporated it in their written agreement. See ch 3 (3 2 2).

¹⁴⁶ 2002 3 SA 653 (NC).

¹⁴⁷ 667G-I.

¹⁴⁸ 1969 1 SA 92 (T).

¹⁴⁹ 98D-E.

The question arises whether such judicial navigation, which often results in drawing tenuous distinctions, could not have been avoided altogether in the absence of the first step.

5 3 3 Is *ex facie* compliance with statutory formalities necessary?

It would appear that despite the rule that statutory formalities are constitutive in nature and that this precludes consideration of any underlying agreement or prior intention independent of the document for the purposes of determining *ex facie* compliance, not all courts subscribe to this rule. At least in *Litecor Voltex*, as well as in those cases where substantive invalidity was clear *ex facie* the document, the court indirectly recognised the separate existence of such an underlying agreement. A comprehensive evaluation of the approaches discussed above and their implications for the policy concerns informing the imposition of the two-step approach must be undertaken, since the real issue is whether the recognition of an underlying agreement is in fact subversive of statutory formalities from a functional perspective. This will be addressed later in this chapter.¹⁵⁰ For current purposes, certain preliminary points of criticism of the position that a document which does not comply with statutory formalities cannot be rectified, will be considered.

First, it is unclear whether *Weinerlein* actually supports the proposition set out in *Dowdle*, and relied upon in *Magwaza*, that an agreement which is subject to statutory formalities cannot be rectified if it does not first comply with those formalities. Presumably, the court in *Dowdle* was relying on the following portion of De Villiers JA's judgment:¹⁵¹

"By putting the agreement in writing and signing it the parties have complied with the provisions of s 30 [of Transvaal Proclamation 8 of 1902]. So far, therefore, as that section is concerned, the agreement stands ... We were pressed with the decision of the Transvaal Supreme Court in the case of *Jolly v Herman's Executors* 1903 TS 515 [*"Jolly"*] in which it was laid down that there

¹⁵⁰ See 5 3 5 below.

¹⁵¹ In *Dowdle's Estate v Dowdle* 1947 3 SA 340 (T) 354, Dowling AJ does not indicate which judgment in the *Weinerlein* case implies that non-compliance with statutory formalities precludes rectification. However, in *Vogel NO v Volkersz* 1977 1 SA 537 (T) 557A-B, Botha J indicates that it is that part of De Villiers JA's judgment quoted in the main text above. This portion of De Villiers JA's judgment is also cited in *Magwaza v Heenan* 1979 2 SA 1019 (A) 1025E-H.

is no *vinculum juris* between the parties to a mineral contract as long as the contract has not been notarially executed and duly registered in accordance with the Volksraad Besluit. It was urged that *Jolly's* case gives a person a right to resile as long as the provisions of the Volksraad Besluit have not been complied with and that the plaintiffs have a similar right in the present case ... But there is nothing inconsistent in this view of s 30 with the decision in *Jolly's* case. No doubt s 30 gives either party the right to refuse to complete the agreement before it has been put into writing and signed, but there is nothing in the section to compel the same conclusion where the agreement has been reduced to writing and signed. The two cases differ *toto caelo*. In the one case there is no contract between the parties, who are free to go on with the contract or not as they please. In the other there is a concluded contract between them, *contractus absolutus et perfectus est*. (C 4.21.17; C 4.38.15; Faber C 4.16.14; Perezius C 21.10.)¹⁵²

Botha J expressed doubt in *Vogel NO v Volkersz*¹⁵³ as to whether De Villiers JA's judgment supported the general proposition that non-compliance with statutory formalities rendered a written agreement incapable of rectification. As the judge points out, the court in *Weinerlein* was confronted with the question whether rectification of a written agreement for the sale of land, which complied with the relevant formalities but which failed to describe the merx accurately, would be contrary to the relevant statutory formalities. It was not asked to consider what the case would be if the agreement did not comply with statutory formalities.¹⁵⁴

Malan goes even further and argues that De Villiers JA's judgment could be interpreted to mean that the mere reduction of the agreement to a signed document is sufficient for a court to consider rectifying an agreement subject to statutory formalities.¹⁵⁵ According to him,¹⁵⁶ this quoted portion of the judgment should be understood in light of the argument made by counsel for the plaintiffs to the effect that the absence of a valid, antecedent contract between the parties precluded rectification of the written document in order to reflect the parties' actual agreement. This was because

"[t]o seek to bind the plaintiffs to such a contract ... it is not a sufficient compliance with the section to show that there is a writing signed by both parties, unless each term of the

¹⁵² *Weinerlein v Goch Buildings Ltd* 1925 AD 282 290 per De Villiers JA.

¹⁵³ 1977 (1) SA 537 (T) 557A.

¹⁵⁴ 557A-C.

¹⁵⁵ *Rektifikasie* 258-259.

¹⁵⁶ 259.

antecedent verbal agreement has been embodied in the writing. In the absence of such a term in the instrument the plaintiff cannot be said to have agreed to that term because he has not agreed to it in writing.”¹⁵⁷

According to Malan, De Villiers JA’s response indicates that all which is required is that there must be an instrument which can be rectified; the fact that it reflects a void contract is neither here nor there.¹⁵⁸ Furthermore, the purpose of drawing the distinction with *Jolly* was simply to indicate that in that case, the basic formal requirements of notarial execution and registration had not been complied with, and as a result there was nothing to rectify.¹⁵⁹ Malan argues that where writing only is prescribed, and the parties have complied with this requirement, there is something to rectify, albeit not a fully enforceable and valid contract. Thus,

“[w]at Appèlregter De Villiers dus bedoel, is dat die partye die kontrak op skrif gestel het; daar is dus iets om te rektifiseer en dit kan gerektifiseer word. In die lig van voorgaande moet dit duidelik wees dat Appèlregter De Villiers nie bedoel het dat die skriftelike stuk op die oog af geldig moet wees nie; hy het bloot skrifstelling vereis in teenstelling met ‘n algehele afwesigheid van skrifstelling.”¹⁶⁰

Such an interpretation of De Villiers JA’s judgment does appear to resonate in the judgment of Wessels JA, where he states that

“[a]ll therefore, that sec. 30 says in effect is that the Courts will not recognise any contract of sale as a legal act unless it is in writing, but once the contract is in writing the Court will not allow it to be used as an engine of fraud to extort from an adversary what the claimant knows that he never was entitled to and in order to prevent this it will cause the written contract ... to be rectified.”¹⁶¹

Furthermore, Malan’s interpretation would appear to be more in line with the equitable origins of the remedy of rectification. All three judgments in the *Weinerlein* case emphasise the fact that to allow a party to rely on a written document which does not

¹⁵⁷ *Weinerlein v Goch Buildings Ltd* 1925 AD 282 289-290.

¹⁵⁸ *Rektifikasie* 259.

¹⁵⁹ 259.

¹⁶⁰ 260.

¹⁶¹ *Weinerlein v Goch Buildings Ltd* 1925 AD 282 293.

accurately reflect the parties' intention is to allow that party to perpetrate a type of fraud.¹⁶² The imposition of the first step, contrary to this fraud-prevention purpose of rectification (and, incidentally, of formalities), allows a party to rely on the formal invalidity of the document, in spite of the fact that the parties may have orally agreed on all the particulars of their agreement. This does not seem to be consistent with the general equitable origins of the remedy of rectification emphasised in the *Weinerlein* case.

Despite the possible merits of Malan's argument, it does display some weaknesses. For example he, like Dowling AJ in the *Dowdle* case, appears to lose sight of the fact that the court was not asked to consider whether the rectification of an agreement which did not comply with statutory formalities would be possible. Furthermore, it is arguable that the relaxation of the prior concluded contract requirement has nothing to do with whether a formally invalid agreement can be rectified, but rather with what must be proved in order to succeed with a claim for rectification. Nevertheless, Malan's interpretation of De Villiers JA's judgment does appear to present a solution to the problems which have arisen with the requirement that a document must first comply with statutory formalities before it can be rectified.

In addition to the possibly suspect origins of the first step, its imposition has also led to the development of the rather tenuous distinction between formal and substantive invalidity in an attempt to avoid it. As discussed above, it is unclear why the apparent formal invalidity of a document recording an agreement subject to formalities should preclude rectification, whereas substantive invalidity apparent *ex facie* the document would not. Such a distinction is illogical. If the effect of constitutive formal requirements is to equate the document with the parties' agreement, then any kind of invalidity *ex facie* the recordal should preclude rectification on the basis that no obligation is created and as a consequence, that there is nothing to rectify. Furthermore, cases like *Litecor Voltex* and *Engelbrecht* create doubt as to what exactly formal and substantive invalidity mean in the context of the first step. This is not conducive to the certainty that the first step is supposed to promote.¹⁶³

¹⁶² 288-289 per De Villiers JA; 292-293 per Wessels JA; 294 per Kotze JA.

¹⁶³ *Magwaza v Heenan* 1979 2 SA 1019 (A) 1029E-F.

Even within the context of formal validity itself, there appears to be uncertainty over the extent to which extrinsic evidence is admissible in order to prove that a document is formally invalid. Cases like *Intercontinental Exports*, *Cohen (1)* and *Brits* suggest that extrinsic evidence is never permissible to contradict what appears *ex facie* the document. Thus, if a document appears to record a formally valid agreement, the court will proceed to the second step, despite the fact that the actual agreement between the parties may not comply with formal requirements. This rule applies to the *essentialia* of the agreement, as well as all other material terms.

However, in *Philmatt* the Supreme Court of Appeal decided that evidence of an omitted material term is permissible when it is tendered to show that a written agreement, which is subject to formalities, did not contain that term and is for that reason invalid. If the *Philmatt* case is taken as overruling contrary decisions, then it seems to have far-reaching implications for what the courts were doing in cases like *Cohen (1)* and *Brits*. If it is true that an agreement subject to statutory formalities must contain all the material terms of the parties' agreement, and that the failure to include such a term renders the agreement (formally) void, then cases which have proceeded to rectify agreements from which a material term has been omitted are arguably rectifying a nullity. If this is so, then the first step, at least in these types of cases, is rendered nugatory.

In any event, the requirement of apparent formal validity as a prerequisite to rectification appears to be based on a logical error about the nature of the remedy. Statements to the effect that "[one] cannot, by rectification, invest a document which, on the face of it, is null and void, with legal force"¹⁶⁴ and that "[being] a nullity, [an agreement subject to formalities cannot] be rectified so as to become a valid contract"¹⁶⁵ presuppose that rectification, in itself, constitutes transformation and/or enforcement of a nullity. This is incorrect: rectification simply corrects the document.¹⁶⁶ In *Spiller* it was noted that rectification

¹⁶⁴ *Dowdle's Estate v Dowdle* 1947 3 SA 340 (T) 354.

¹⁶⁵ *Kourie v Bean* 1949 2 SA 567 (T) 572.

¹⁶⁶ *Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd* 2009 3 SA 447 (SCA) para 13; Kerr *The Law of Contract* 156. This point relates to a similar one made by De Wet and Van Wyk *Kontraktereg* 1 323 n 55, who remark that the approach of the courts amounts to a conceptual confusion (*begripsverwarring*): rectification does not change the contract, but rather the document that is an inaccurate reflection of that contract. L Tager "Rectification of Invalid Contracts" (1977) 94 SALJ 8 11 submits that even though the document and the obligation are said to come into existence at the same time, they can be separated

relates to and concerns the document, but that does not mean that the remedy is focused on the enforcement of the agreement it reflects.¹⁶⁷ In other words, a distinction can be made between the correction of the document, which is the purpose of rectification, and the enforcement of the recorded agreement once corrected. This distinction between correction and enforcement was confirmed by the Supreme Court of Appeal in *Akasia Road Surfacing (Pty) Ltd v Shoredits Holdings Ltd*.¹⁶⁸ The court permitted the rectification of a written agreement despite the possibility (and the court considered it no more than a mere possibility) that the correction might render the written agreement too vague to be enforced. According to the court, provided the parties' common intention is clear, it is irrelevant that the rectification of the document may have the effect that there are no longer any enforceable rights and obligations.¹⁶⁹

Finally, there is an inherent contradiction in the South African approach. When strictly applied, the first step to rectification ignores the existence of an underlying agreement because, as discussed above, the document itself is regarded as the sole embodiment of the parties' agreement and therefore as the only determinant of the validity of the agreement. However, when the further requirements for rectification are considered, South African courts recognise that the document is merely the recordal of an underlying agreement or at least a common continuing intention. This is artificial: an agreement or common intention cannot exist for some purposes and not for others. Arguably, the fact that local courts adopt a two-step approach promotes this artificiality by allowing them to regard the first step as an issue of compliance with statutory formalities and the second as a claim for rectification, whereas the actual issue should be whether the rectification of the document in the particular circumstances would subvert the functions of formalities.

conceptually and therefore should be treated separately in a claim for rectification. According to these writers, rectification should be permitted even where the document on the face of it does not comply with formalities.

¹⁶⁷ *Spiller v Lawrence* 1976 1 SA 307 (N) 313A-D. See also Tager 1977 SALJ 11; *Lazarus v Gorfinkel* 1988 4 SA 123 (C).

¹⁶⁸ 2002 3 SA 346 (SCA).

¹⁶⁹ *Akasia Road Surfacing (Pty) Ltd v Shoredits Holdings Ltd* 2002 3 SA 346 (SCA) paras 14, 16. In this regard the court did not refer to opinions to the contrary which indicated that when rectification would be pointless, eg when the parties' prior agreement or intention is inchoate, a court will not rectify a document. See *Spiller v Lawrence* 1976 1 SA 307 (N) 308G; Bamford 1963 SALJ 528 534; Kerr *The Law of Contract* 152.

5 3 4 A comparative perspective on the correction of written agreements

As will become apparent, civilian and common-law courts are also required to determine the extent to which compliance with formal requirements should outweigh the need to give effect to what the parties actually agreed upon or intended. It is therefore appropriate to consider how civilian and common-law courts would deal with this challenge.

5 3 4 1 *A civilian approach to the correction of errors in agreements subject to statutory formalities*

It was noted earlier that German law does not recognise a rule similar to the parol evidence rule, which excludes all extrinsic evidence when the document purports to be the sole record of the parties' agreement.¹⁷⁰ However, it does recognise a presumption in favour of the completeness and accuracy of a written document, which is even stronger in the case of agreements which must be reduced to writing by virtue of statutory formalities. Nevertheless, this jurisdiction also allows a written agreement to be brought into line with the parties' actual intention when, by virtue of a mistake, the former does not constitute an accurate recordal of the parties' consensus.

As a preliminary point, there appears to be an inconsistency between allowing the parties' subjective intention to override the objective meaning of the written terms and the (primarily) objective approach to interpretation adopted in this system.¹⁷¹ Since the

¹⁷⁰ See ch 4 (4 2 1).

¹⁷¹ § 133 BGB states that when interpreting a declaration of intent, it is necessary to ascertain the true intention behind the declaration rather than being bound to its literal meaning. However, § 133 BGB alone does not determine the meaning of a contract; it is applied in conjunction with § 157 BGB which requires an interpreter to interpret a contract with the requirements of good faith in mind, taking commercial practice into account. Thus, the ostensibly subjective approach to interpretation in German law is in fact combined with various objective elements (B Markesinis, H Unberath & A Johnston *The German Law of Contract: A Comparative Treatise* 2 ed (2006) 134). This means that a declaration of intent is not interpreted in terms of the intention of the party making the declaration, but rather as it would be understood by a reasonable person in the position of the recipient of the declaration (See Vogenauer "Interpretation" in *Contract Terms* 128 who states that "[t]he interpreter, to use a catchword repeated over and over again, has to adopt the 'objective perspective of the recipient of the declaration' ('objektiver Empfängerhorizont')"; see also Markesinis et al *German Law of Contract* 135). During this process of interpretation, all types of extrinsic evidence are admissible, including subjective statements of intent (whether prior, simultaneous or

meaning of a contract is purportedly determined from the perspective of a reasonable person in the position of the respective addressees of the declarations of intent, and not in accordance with the subjective intention with which these declarations were made, the stated intention of the parties as to the meaning of a term is usually regarded as irrelevant.¹⁷² This presents a doctrinal hurdle when the parties have recorded a written agreement which does not accurately reflect their intention.

Rather than relying on paragraph 133 BGB to justify correcting such a written document, German courts approach this problem as a type of mistake in expression, and solve it according to the old Roman maxim *falsa demonstratio non nocet*: a false description does not vitiate the contract. Incidentally, this maxim is also used in English law, but the scope of its application is narrower than in German law. In the former jurisdiction, it is utilised in situations when the words used in a contract to describe the subject-matter, apply in part correctly and in part incorrectly to that subject-matter. In such a case, a court will apply the correct part, and reject the incorrect part.¹⁷³ Thus, the maxim is applied to remedy inconsistencies within the written document.¹⁷⁴ In German law, the maxim allows a court to consider the parties' actual agreement, which then prevails over the words used in the contract. Although this appears to be inconsistent with the objective approach to interpretation adopted in this system, it is reconcilable with its underlying justification – it cannot be said that either party has *justifiably* relied on the objective meaning of the terms.¹⁷⁵ Enforcing the contract as originally intended is also in accordance with the principle of good faith.¹⁷⁶

There are two categories of cases which are dealt with in terms of the *falsa demonstratio* principle. The first group contains those cases which would be labelled as rectification for a common mistake in English and South African law. The representative German case in

subsequent to contract conclusion), previous negotiations, and subsequent conduct (Vogenauer "Interpretation" in *Contract Terms* 135).

¹⁷² Vogenauer "Interpretation" in *Contract Terms* 140.

¹⁷³ See K Lewison *The Interpretation of Contracts* 5 ed (2011) § 9.05.

¹⁷⁴ Vogenauer "Interpretation" in *Contract Terms* 141; *AJ Dunning & Sons (Shopfitters) Ltd v Sykes & Son (Poole) Ltd* [1987] 1 Ch 287.

¹⁷⁵ Vogenauer "Interpretation" in *Contract Terms* 141.

¹⁷⁶ Vogenauer "Interpretation" in *Contract Terms* 141; Markesinis et al *German Law of Contract* 135.

this group is the well-known “*Shark meat case*”.¹⁷⁷ Here, the parties concluded a contract of sale for *haakjöringsköd*, believing it meant “whale meat” in Norwegian, when in fact it meant shark meat. The court found that both parties had intended to contract for whale meat, but had erroneously used the wrong word to express that intention; as a result, the court held that the legal relationship between the parties must be assessed as if they had used the expression “whale meat”.¹⁷⁸ Another example of where the court gave effect to the parties’ actual intention is in the case where the contract described the land to be sold as parcels 31 and 32; the parties actually intended that an additional piece of land, parcel 33, would also be sold.¹⁷⁹ Here too the parties’ common intention took precedence over the incomplete description in the contract.

The second group of cases to which the *falsa demonstratio* principle would be applied, consists of those which would be treated as rectification for a unilateral mistake in English and South African law: where one party was labouring under a mistake as to the meaning of a term and the other party was aware of this actual intention, but did not indicate that his own was different. In such a case, the judge has

“to determine the content of the contract in accordance with the intention of the [mistaken party]. The reason for this is that, if both parties to the contract have understood a declaration of intention in a particular sense, it is this mutually corresponding intention, and not the words of the declaration, which is decisive. It is not necessary that the recipient of the declaration embraces the true intention of the person making the declaration. It is rather sufficient that he recognises the intention and concludes the contract in the knowledge of this intention.”¹⁸⁰

¹⁷⁷ RGZ 99, 147 (08-06-1920) (a translation of the judgment can be found in H Beale, B Fauvarque-Cosson, J Rutgers, D Tallon & S Vogenauer *Ius Commune Casebooks for the Common Law of Europe: Cases, Materials and Text on Contract Law* 2 ed (2010) 445-446).

¹⁷⁸ In English law, this type of fact pattern would not be capable of being resolved through application of the *falsa demonstratio* principle. The description *haakjöringsköd* fits the subject-matter “shark meat”; in such a case, “if the description, taken as a whole, does fit some subject without inaccuracy, the court cannot reject part of the description by the application of the principle” (Lewison *Interpretation of Contracts* 483-484).

¹⁷⁹ BGHZ 87, 150 (25-03-1983) 152-155. A similar case in English law is *Craddock Brothers v Hunt* [1923] 2 Ch 126, where the court used the remedy of rectification to resolve the discrepancy between the description in the document and the parties’ actual agreement. Again, the principle of *falsa demonstratio* would not be capable of application.

¹⁸⁰ BGH NJW-RR 1993, 373 (translated in Vogenauer “Interpretation” in *Contract Terms* 142).

Vogenauer criticises the application of the *falsa demonstratio* principle (evident in the second sentence quoted above) to cases where one party is mistaken, and the other is aware of this mistake but does nothing to correct it. He argues that the principle is seen as a narrow exception to the objective approach, and its application can only be justified by the existence of a common intention, something which is lacking in this type of fact pattern.¹⁸¹ He argues that an approach which is more consistent with the general approach to contractual interpretation in German law is that which was adopted in earlier case law. In these cases,¹⁸² the courts relied on paragraph 116 BGB which provides that a declaration made by a party who secretly reserves to himself the intention not to be bound to the declaration (ie a *reservatio mentalis*) is not void for that reason alone. For example, a declaration is made to sell parcels 31, 32 and 33, and the offeree accepts the offer, knowing that the offeror made a mistake (the intention was only to sell parcels 31 and 32), and yet secretly reserves to himself the intention not to be bound to the offeror's actual intention. In such a case, the offeror's actual intention will be enforced, because a reasonable person in the position of the offeree would have understood the declaration as it was intended.¹⁸³ According to Vogenauer, this past approach of the courts is more consistent with the objective approach to interpretation in the German legal system, because it reinforces the idea that a declaration of intent is to be understood from the perspective of a reasonable person in the position of the recipient of that declaration, taking into account good faith and having regard to commercial practice (thus, in terms of the combined application of paragraphs 133 and 157 BGB). A party who knows that the other party is mistaken but does nothing to correct it and who secretly reserves to himself the idea that he will not be bound to that party's actual intention is acting in bad faith and, furthermore, cannot be said to have justifiably relied on the meaning of the words used.¹⁸⁴

¹⁸¹ "Interpretation" in *Contract Terms* 142.

¹⁸² RGZ 66, 427 (29-10-1907) 429; RGZ 92, 297 (18-09-1918) 299.

¹⁸³ Vogenauer "Interpretation" in *Contract Terms* 142. Cf *Benjamin v Gurewitz* 1973 1 SA 418 (A) 424F-H, 425D in which it was held that the unilateral mistake of the purchaser, of which the seller was aware, justified rectification on the basis that there was a "common intention" – the only common intention which could exist on the facts of that case was the purchaser's intention to pay half the purchase price of the shares, coupled with the reasonable reliance that the seller also shared that intention. See also the *obiter dictum* in *Nasionale Behuisingskommissie v Greyling* 1986 4 SA 914 927F-I, in which the court pointed out that rectification could have been claimed - on the court's own interpretation of the facts of that case, such rectification would probably also have been justified on the basis of reliance theory.

¹⁸⁴ Vogenauer "Interpretation" in *Contract Terms* 143. See also Beale et al *Ius Commune Casebook* 455-456.

Thus, the German approach is to characterise situations where the document does not accurately represent the parties' intention as a matter of interpretation or construction. This is largely due to the fact that this system does not recognise a rule similar in effect to the parol evidence rule – in principle, all extrinsic evidence is admissible in order to determine whether a written agreement is valid and what it means.¹⁸⁵ The presumption which exists here as to the completeness and accuracy of a written agreement merely affects the weight of this evidence. As discussed above, while Vogenauer appears to agree in principle with the German courts' application of the *falsa demonstratio* principle to situations where the parties have a shared intention which is not accurately reflected in the written document, he argues that this principle is not appropriately applied in cases where there has been a unilateral mistake of which the other party was aware. By suggesting that the more correct approach is one which emphasises that a party's mental reservation does not, for that reason, render a contract invalid, he seems to be suggesting that the problem, at least insofar as it relates to unilateral mistakes, should be reclassified as one of contract conclusion.

The *falsa demonstratio* principle, as it is applied in German law, presupposes that there is in fact an inaccurate or insufficient description of a term in the contract. However, it also appears that when an essential term of the agreement subject to formalities is omitted from the contract, a German court will use the *Andeutungstheorie* to determine whether there is some allusion or 'indication' of this omitted term in the contract itself.¹⁸⁶ If there is such an allusion, the court will permit evidence of external circumstances to discover whether the parties had in fact agreed upon the omitted term.¹⁸⁷ As a second step, the court will then determine whether the contract is formally valid in light of these external circumstances. The justification underlying this approach is that evidentiary certainty is trumped by the belief of the parties that they have concluded a valid agreement.¹⁸⁸

¹⁸⁵ B Häcker "Mistakes in the Execution of Documents: Recent Cases on Rectification and Related Doctrines" (2008) 19 *KLJ* 293 306-307.

¹⁸⁶ This theory is discussed in ch 4 (4 2 1).

¹⁸⁷ See eg R Kanzleiter "§ 311b" in W Krüger (ed) *Münchener Kommentar zum Bürgerlichen Gesetzbuch 2 Allgemeiner Teil: §§ 241-432* 5 ed (2007) n 64.

¹⁸⁸ N 64.

In common-law jurisdictions, as in South Africa, this particular problem cannot be dealt with as one of interpretation, since the parol evidence rule precludes consideration of the parties' prior agreement or intentions when interpreting a written agreement. However, an examination of the way in which rectification proceeds in these common-law jurisdictions also indicates that a court will first rectify an agreement before determining its formal validity.

5 3 4 2 *The common-law approach to the correction of errors in agreements subject to statutory formalities*

Unlike South African courts, common-law courts do not hesitate to rectify an agreement subject to formalities, even when the documented recordal fails to comply with them. This was not always the position in English law: until the authoritative decision in *Joscelyne v Nissen*,¹⁸⁹ it was unclear whether a document recording an agreement subject to statutory formalities could be rectified to give effect to a prior oral agreement or whether the fact that that prior agreement did not constitute a valid contract precluded such a claim.

However, the introduction of the "prior common intention" requirement in common-law jurisdictions allows a court to rectify the document so that it complies with the relevant legislation rather than because it does so. Therefore, even where essential terms have been omitted from the document, these terms may be inserted, provided the traditional requirements for rectification have been met,¹⁹⁰ namely that

"(1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (2) there was an outward expression of accord; (3) the intention continued at the time of the execution of the instrument

¹⁸⁹ [1970] 2 QB 86.

¹⁹⁰ E Peel *Treitel's The Law of Contract* 13 ed (2011) 191, 348; C N Brown *Corbin on Contracts* 4: *Statute of Frauds* §§ 12.1-23.11 (1997) § 14.22; American Law Institute *Restatement (Second) of the Law of Contracts* (1981) § 156 (where it is stated that there is no meaningful distinction between errors of commission and those of omission); *United States of America v Motor Trucks Ltd* [1924] AC 196; *Craddock Brothers v Hunt* [1923] 2 Ch 136; *GMAC Commercial Credit Development Limited v Kalvinder Singh Sandhu, Kewal Singh Sandhu* [2004] EWHC 716; *Hughes v Payne* 22 SD 293, 117 NW 363 (1908); *Calhoun v Downs* 211 Cal 766, 297 P 548 (1931); *Whiting v Diver Plumbing & Heating Ltd* [1992] 1 NZLR 560 569; *Jireh Customs Limited v Clode* [2008] NZHC 1665.

sought to be rectified; [and] (4) by mistake the instrument did not reflect that common intention.”¹⁹¹

This phenomenon may be explained on the basis that the relevant legislation usually prescribes different consequences for non-compliance with statutory formalities. For example, the English Statute of Frauds provides that when a guarantee does not contain all the terms of the parties' agreement, that guarantee is merely unenforceable, rather than void. This means that

“[t]he statute, in fact, only provides that no agreement not in writing and not duly signed shall be sued on: but when the written instrument is rectified there is a writing which satisfies the statute, the jurisdiction of the court to rectify being outside the prohibition of the statute.”¹⁹²

Unenforceability means that common-law courts do not have to grapple with the apparent legal problem of rectifying a document which simultaneously constitutes the agreement between the parties and which appears to be a nullity.¹⁹³ It allows a court to recognise that there is an underlying agreement or intention and to rectify a document which does not represent that agreement or intention accurately. Unlike their South African counterparts furthermore, common-law courts are not faced with the apparent difficulty of distinguishing between the consequences of non-compliance with statutory formalities and the failure to record an agreement accurately. As the above quotation illustrates, the relevant legislation makes it clear that non-compliance leads to unenforceability; since rectification is aimed at the correction of the document and not its enforcement, a court which grants the remedy does not circumvent the prohibition of the relevant statute.¹⁹⁴

Admittedly, not much can be gained from attempting to compare the consequence of unenforceability with that of nullity. Something which is void is non-existent, and not merely incapable of being enforced.¹⁹⁵

¹⁹¹ *Swainland Builders Limited v Freehold Properties Limited* [2002] EWCA Civ 560 para 33.

¹⁹² *United States of America v Motor Trucks Ltd* [1924] AC 196 200-201 per the Earl of Birkenhead.

¹⁹³ *Peel Contract* 193 states that the contract can be *concluded* orally, but it can only be *enforced* if the contract has been reduced to writing.

¹⁹⁴ *GMAC Commercial Credit Development Limited v Kalvinder Singh Sandhu, Kewal Singh Sandhu* [2004] EWHC 716 para 58.

¹⁹⁵ See Tager 1977 *SALJ* 14-15.

Nevertheless, there are certain common-law statutes which prescribe invalidity for non-compliance with statutory formalities. The first is section 2(1) of the English Law of Property (Miscellaneous Provisions) Act. However, unlike its South African equivalent, the Act also makes specific provision for the rectification of a deed in order to make it comply with statutory formalities.¹⁹⁶ The fact that this remedy is statutorily permitted in spite of the fact that the agreement is void may suggest that the legislature was not aware of, or disagreed with, the idea that one cannot rectify a void agreement. This makes a direct comparison between the South African and the English approach on the point somewhat difficult, although if the South African approach was as self-evident as the courts assume it to be, one would have expected some academic or judicial commentary on the apparent change in position adopted by the English legislature.¹⁹⁷

The California Civil Code is another statute which prescribes invalidity when certain agreements have not been reduced to writing.¹⁹⁸ While the Code also contains a provision relating to the rectification of agreements, it does not explicitly authorise the rectification of a void agreement in order to comply with formalities.¹⁹⁹ It is therefore useful to note how a Californian court would approach this issue.

In *Oatman v Niemeyer*²⁰⁰ the Supreme Court of California was asked to rectify a deed of sale which failed to describe the property that was the object of the sale. It held as follows:

“There can, of course, be no question but that the deed was void in law, that is, that it failed wholly as conveyance of property since no property was described. But the contention that, for

¹⁹⁶ S 2(4); see also Addendum A.

¹⁹⁷ The change in position refers to the fact that prior to the promulgation of the Act, contracts for the sale of land were governed by the Law of Property Act 1925 which prescribed unenforceability in the event of non-compliance with statutory formalities. The imposition of nullity was a product of the English Law Commission's recommendation in *Formalities for Contracts for Sale etc of Land (Law Com No 164)* (1987). The change was suggested largely due to the uncertainty regarding the enforceability of letters “subject to contract” as memoranda and the scope of the doctrine of part performance (paras 1.4-1.9; see also chs 3 (3 2 1) and 6 (6 4 2)). Despite the fact that non-compliance with statutory formalities now renders an agreement for the sale of land void, the Law Commission confirmed in para 5.6 that rectification would also be available under the new regime, without any comment on the apparent contradiction or inconsistency, at least from a South African perspective, in the notion that a void agreement may be rectified.

¹⁹⁸ § 1624.

¹⁹⁹ § 3399 simply reiterates the general common-law rules relating to rectification.

²⁰⁰ 207 Cal 424, 278 P 1043 (1929).

that reason, it cannot be reformed fails to distinguish between a contract which is void for some fundamental reason and an instrument or writing which is void because of mistake in its preparation. If the contract itself is void, as, for example, because it is immoral or because the parties have not agreed on all of its terms and there is, for that reason, no final contract or understanding between them, ... reformation is impossible, since there is no valid contract to reform. But this is entirely different from a case where there is a valid contract and the parties have endeavored to put it in writing, and have made a mistake in writing down its terms, or have endeavored in accordance with the contract to execute an instrument, such as a deed, for the purpose of carrying it out and, through mistake in the preparation of the instrument, the document fails, either wholly or partially, to accomplish such purpose. The instrument may be void in such a case because of the mistake, but there is still a valid contract; and the contract being valid, equity will reform the instrument to make it what it should be, and would have been except for the mistake. There is no making of a new contract in such a case. There is but the making of a new instrument, either to correctly express the contract or to carry it into effect."²⁰¹

This portion of the judgment is quoted in full as an illustration of a more tenable approach to the problem. First, it indicates that even where formalities are constitutive, a logical distinction can be drawn between the document (instrument) and the underlying agreement or contract. Secondly, it illustrates that rectification of a document which does not comply with formalities does not necessarily lead to the inescapable conclusion that a court is investing a void transaction with validity. Under these circumstances, "[t]here is no making of a new contract", but the correction of the document or deed which inaccurately reflects that agreement. Finally, it places the correct question in the foreground: is the agreement that the parties concluded (and not necessarily its recordal) valid, or void?

Arguably, the approach in both common- and civil law jurisdictions as described maintains a better balance between the need to promote the functions of statutory formalities and the need to give effect to the parties' true intention. Logically, a document should first be corrected before one can determine whether it complies with the requirements for validity, both formal and substantive, and is therefore enforceable.²⁰² In German law, all extrinsic evidence is admissible in order to determine the content of a written agreement. If this evidence indicates that there has been a mistake in the recordal of the agreement, the *falsa demonstratio* principle and the *Andeutungstheorie* allow effect to be given to the parties' true intention. Only thereafter does a court determine whether the corrected

²⁰¹ 426-427.

²⁰² Brown *Corbin on Contracts* 4 234-236. See also Van der Merwe et al *Contract* 157.

agreement is (formally) valid or void. This is also the procedure followed in common-law countries, at least insofar as it relates to rectification: first correct the document and then determine its validity once corrected. Of course, this does not mean that a document will always be rectified when it does not comply with formalities; it simply places the emphasis, correctly it is argued, on the true issue, which is whether the requirements for rectification have been met. Whether the difference in emphasis between the South African approach on the one hand, and the common (and civilian) approach on the other, has any effect on the policy issues underlying the imposition of formalities is considered below.

5 3 5 Rectification of a formally invalid document and the functions of formalities

The rectification of agreements subject to formalities involves two conflicting principles.²⁰³ The first, underlying rectification, is that effect must be given to the true agreement between the parties. The other is that the functions of statutory formalities should not be circumvented. In *Magwaza*, the court opted to give greater weight to the second principle and held that the rectification of an agreement which does not comply with statutory formalities opens the door to fraud, possible perjury and unnecessary litigation.²⁰⁴

As a general rule, South African courts do not consider the policy considerations underlying formal requirements when determining whether an agreement subject to formalities should be rectified, perhaps because there is an assumption that formal validity automatically precludes the subversion of such functions. This is certainly the impression created in *Magwaza*,²⁰⁵ where the court very briefly mentioned that in order to promote the evidentiary function fulfilled by formalities, effect must be given to the plain wording of the relevant statute. This statement was made without considering the fact that while a document may appear to record a formally valid agreement, a mistake in that recordal renders the document inaccurate evidence of the parties' agreement. A document containing an incorrect description of land, for example, is no better evidence of the parties' agreement than a document which contains no description at all. Furthermore, there appears to be an inherent contradiction in an approach which stipulates the

²⁰³ *Republican Press (Pty) Ltd v Martin Murray Associates CC* 1996 2 SA 246 (N) 256A per Squires J.

²⁰⁴ *Magwaza v Heenan* 1979 2 SA 1019 (A) 1029F. According to Friedman J in *Thathiah v Kahn* NO 1982 3 SA 370 (D) 375B-C, this is the true *ratio* of that decision.

²⁰⁵ *Magwaza v Heenan* 1979 2 SA 1019 (A) 1029E-F.

requirement of formal validity as a precondition to rectification in order to prevent uncertainty and disputes and then allows rectification of that document, when the remedy in itself opens the door to uncertainty and disputes.²⁰⁶ However subsequent decisions, if they mention policy issues at all, have simply proceeded on the same assumption of automatic subversion as justification for the decision that a particular agreement cannot be rectified, without investigating whether the facts really merit such a conclusion.

This point is illustrated by a closer examination of the decisions in *Republican Press* and *Intercontinental Exports*. In the former case, the court justified its strict approach on the following basis: the majority, per Hurt J, emphasised that the *Magwaza* decision amounted to a clear policy statement that the intention of the legislator should prevail over the equitable remedy of rectification.²⁰⁷ The fact that giving effect to this intention may lead to anomalous results was not, according to the court, sufficient justification for adopting a “lenient” approach in determining whether a document should be rectified.²⁰⁸ Although *Intercontinental Exports* represents a less strict approach (by recognising that a document is formally valid when it is reasonably capable of an interpretation consistent with validity) the court nevertheless supported the majority decision in *Republican Press*.²⁰⁹

In a previous chapter the following comment was noted:²¹⁰

“Chance may determine whether the transcription error in question, in addition to giving the same name to two parties, introduces a slight difference into the name thereby allowing the principle of *Intercontinental Exports* to operate or whether the name is identical so the case falls within *Republican Press (Pty) Ltd*”.²¹¹

It was further noted there that this criticism loses sight of the difference in the facts of the respective cases: companies cannot have the same names (*Republican Press*) while natural persons can and do (*Intercontinental Exports*).

²⁰⁶ *Vogel NO v Volkersz* 1977 1 SA 537 (T) 558F-G.

²⁰⁷ *Republican Press (Pty) Ltd v Martin Murray Associates CC* 1996 2 SA 246 (N) 253B.

²⁰⁸ 255B-E.

²⁰⁹ *Intercontinental Exports (Pty) Ltd v Fowles* [1999] 2 All SA 304 (A) para 16.

²¹⁰ See ch 3 (3 3 2 2).

²¹¹ C F Forsyth & J T Pretorius *Caney's The Law of Suretyship* 5 ed (2002) 71. This opinion is expressed again in the sixth edition (76 n 73). See also M Nortje “General Principles of Contract” 1999 ASSAL 154 171; J T Pretorius “Surety Issues: A Survey of Recent Cases” (2006) 14 JBL 164 168.

The criticism is more convincing however, when considered in the context of the policy considerations underlying the imposition of formalities. In neither *Republican Press* nor *Intercontinental Exports* did the court consider whether its decision promoted the functions of formalities. From this perspective, the latter decision fails to do so any better than the former. In both cases, the document before the court constituted incorrect and misleading evidence of the true agreement between the parties. In addition, and although this is rarely mentioned in cases dealing with formalities,²¹² the cautionary function of formalities had been fulfilled: the document in each case had been reduced to writing, thereby (presumably) giving the respective sureties an opportunity to consider the obligations they were undertaking. When considered in this light, the different decisions (and approaches) in these two cases, while possibly strictly logically correct, do seem arbitrary.

But what of decisions permitting rectification where the document creates the impression of substantive invalidity? Do they, by limiting the ambit and effect of the first step, subvert the functions of formalities by recognising that there is an agreement independent of the document which records it? While possibly contrary to the rule that the document is the sole manifestation of the parties' agreement, it is suggested that these cases appear to promote at least the evidentiary function of formalities, since the document once rectified constitutes accurate evidence of the parties' (valid) agreement.

This recognition that an inaccurate recordal constitutes misleading evidence of the parties' true intention, and should be corrected for that reason, appears to underlie the application of the *falsa demonstratio* principle and the *Andeutungstheorie* in German law. In the context of the sale of land, the comment has been made that where there is an inaccurate description of the subject-matter, it is (usually) only the evidentiary function of the document which fails; the function of writing as a means to warn and inform the parties is

²¹² The minority judgment in *Republican Press (Pty) Ltd v Martin Murray Associates CC* 1996 2 SA 246 (N) proves to be one of the few exceptions. Squires J alluded to the cautionary function of formalities when he said that "[t]he relevant party, in the form of the surety, has addressed himself and his mind to the completion of the document, but erroneously also recorded the creditor's name as that of the principal debtor." (259I-260A).

nevertheless fulfilled.²¹³ This being the case, the document may be corrected in order to present an accurate record of the parties' agreement. A similar argument appears to underlie the common-law approach. For example, it has been stated that

"[t]he theory of reformation is that the instrument already *is* subjectively – i.e., to the parties – what they supposed it to be, and therefore that the statutory requirement of writing is, subjectively at least, satisfied; and that the 'reformation' is needed only to make the instrument appear to all the rest of the world as it appeared (and therefore legally was) to the parties when they signed it."²¹⁴

It is therefore arguable that the requirement of formal validity as a prerequisite to the rectification of an agreement subject to formalities is not only illogical, inconsistently applied and uncertain in its ambit, but also unnecessary from a functional perspective. Cases like *Republican Press* and *Intercontinental Exports* illustrate that the first step does not really promote the functions of formalities any better than a decision like *Litecor Voltex* which appears to avoid it. In fact, all that these cases really achieve is to "demonstrate the irrelevance of apparent formal validity as a litmus test for the rectification of a formal contract."²¹⁵

A more convincing argument would be that statutory formalities are undermined when non-compliance with formal requirements reflects the lack of agreement between the parties on a term which is required to be in writing. Rectification in these circumstances would subvert formalities legislation by opening the door to the possibility of fraud and perjury. However, this subversion could be prevented through a proper consideration and application of the requirements of rectification. It is these requirements which serve as the focus of the next section.

²¹³ See Kanzleiter "§ 311b" in *Münchener Kommentar* 2 n 67. Even where these warning and information functions of formalities have failed, the document is nevertheless corrected in order to ensure the parties' reliance on the "workability" of the contract.

²¹⁴ J H Chadbourn *Evidence in Trials at Common Law* by John Henry Wigmore 9 (1981) § 2417(3).

²¹⁵ Nortje 1999 ASSAL 171.

5 4 The second step: the requirements for rectification

5 4 1 Introduction

Once it is proved that there has been compliance with statutory formalities *ex facie* the document, a party seeking rectification must prove that the parties shared a common intention which they intended to express in their written document, but which they failed to do by virtue of a mistake.²¹⁶

A claim for rectification of an agreement subject to statutory formalities therefore has four main elements: (i) there is a document which on its face complies with formalities; (ii) there is a common intention which is not reflected accurately in the document; (iii) such inaccuracy is the result of a mistake; and (iv) the document should be corrected in a certain way to give effect to the parties' common intention.²¹⁷ This discussion will focus on the second and third elements, since the fourth depends on the facts and the first has already been discussed.

5 4 2 The requirement of a “prior common intention”

If the remedy of rectification was received from English law, then the South African courts preceded their English counterparts in the relaxation of at least one of its requirements, namely that it is sufficient to prove the existence of a prior common intention, rather than a prior valid contract, which is not reflected in the written document. However, the meaning

²¹⁶ See *Meyer v Merchant's Trust Ltd* 1942 AD 244 253; *Von Ziegler v Superior Furniture Manufacturers (Pty) Ltd* 1962 3 SA 399 (T) 410H; Van der Merwe et al *Contract* 154. Either the plaintiff or the defendant may seek rectification, but the latter may also raise the fact that the agreement sought to be enforced by the plaintiff is an incorrect recordal of their actual agreement, without simultaneously claiming that the agreement should be rectified. *Lombaard v Droprop CC* 2010 5 SA 1 (SCA) para 12; Van der Merwe et al *Contract* 154 n 195.

²¹⁷ Even if the plaintiff could prove these elements, it is nevertheless possible that rectification could be excluded as a matter of law (see eg *Nedbank Ltd v Chance* 2008 4 SA 209 (D) para 9 for the exclusion of rectification once a *concursum creditorum* has been established) or by agreement (Bamford 1963 *SALJ* 537, although Kerr *The Law of Contract* 155 differs on this point).

of a prior common intention, as opposed to a prior contract, is not easy to determine, particularly in the light of the fact that courts often refer to it without elaboration.²¹⁸

In the *Weinerlein* case, the court had to consider whether an incorrect description of land in a written contract could be rectified, where the parties had previously verbally agreed upon the correct piece of land.²¹⁹ Counsel for the plaintiffs argued that the written contract could not be rectified because, in accordance with the English case of *Mackenzie v Coulson*²²⁰ there had to be proof of an “actual concluded contract [ie one which was both formally and substantively valid] antecedent to the instrument which is sought to be rectified”.²²¹

In English law, this prior valid contract requirement was particularly problematic when non-compliance with statutory formalities, like seals, resulted in nullity rather than unenforceability. For example, in *W Higgins Ltd v Northhampton Corp*,²²² the plaintiff sought to have a document, which had been sealed by the defendant, rectified in light of a prior agreement which had been reduced to writing but had not been sealed. The consequence of this omission was that the prior agreement was void for failure to comply with statutory formalities. According to Romer J, the problem faced by the court in determining whether the prior valid contract requirement had been met was not that there was a prior oral agreement between the parties which could not be enforced (as would have been the case if the agreement had been subject to the Statute of Frauds), but that

“there was no parol contract at all, no contract of any kind at all between the parties until the contract under seal was executed.”²²³

The court held that where there was no preceding valid contract, the document could not be rectified in spite of the fact that both parties might have agreed fully on something different to that evidenced in the document.

²¹⁸ See eg *Dormell Properties 282 CC v Renasa Insurance Co Ltd and Others* NNO 2011 1 SA 70 (SCA) paras 32-37; *Humphrys v Laser Transport Holdings Ltd* 1994 4 SA 388 (C) 395I-397A; *Levin v Zoutendijk* 1979 3 SA 1145 (W) 1148A.

²¹⁹ *Weinerlein v Goch Buildings Ltd* 1925 AD 282 287-288.

²²⁰ (1869) LR 8 Eq 368.

²²¹ 375.

²²² [1927] 1 Ch 128.

²²³ 137-138.

Had the court in *Weinerlein* decided to follow the English approach at the time, the claim for rectification would not have succeeded. While there had been an oral agreement between the parties prior to its reduction to writing, this was invalid for failure to comply with statutory formalities – it could not, therefore, constitute a valid prior *contract*. However, De Villiers JA held that the rule in *Mackenzie v Coulson*²²⁴ was satisfied if the parties had arrived at a “*consensus ad idem* in the shape of an agreement”.²²⁵

Thus, the *Weinerlein* decision introduced the distinction between a prior valid *contract* and a prior common *agreement*. The former complies with all the validity requirements for a contract, including statutory formalities where relevant. A prior common agreement has the necessary intention and *animus contrahendi*, but does not comply with all other requirements to constitute a fully enforceable and valid contract.²²⁶ This still does not explain the reference simply to a common intention as a requirement for a successful claim for rectification. This development was ushered in by the decision in *Meyer v Merchant's Trust Ltd*²²⁷ (“*Meyer*”).

In this case, the appellant had signed a suretyship agreement which stipulated that he would act as surety for a certain company, provided that “the total amount that may be owing by Gabbe & Meyer ... shall not exceed ... £250”. After summons had been issued, it was discovered that certain words had been omitted from the suretyship – the words “total amount” should have been followed by the phrase “recoverable from me notwithstanding the amount”.²²⁸ The respondent sought to have the suretyship rectified.

²²⁴ (1869) LR 8 Eq 368.

²²⁵ *Weinerlein v Goch Buildings Ltd* 1925 AD 282 288. Although De Villiers JA was of the opinion that the rule was satisfied by means of proof of an oral agreement, this is not the interpretation of *Mackenzie v Coulson* (1869) LR 8 Eq 368 which was adopted in subsequent English case law: see *Faraday v Tamworth Union* (1916) 86 LJ Ch 436 438; *Craddock Brothers v Hunt* [1923] 2 Ch 136 159-160; *United States of America v Motor Trucks Ltd* [1924] AC 196 199, 200.

²²⁶ See eg *Humphrys v Laser Transport Holdings Ltd* 1994 (4) SA 388 (C) (“agreement in principle”); *Akasia Road Surfacing (Pty) Ltd v Shoredits Holdings Ltd* 2002 (3) SA 346 (SCA), in which the court rectified the document in spite of the fact that the prior agreement may have been void for vagueness.

²²⁷ 1942 AD 244.

²²⁸ 247-248.

In order to make sense of the court's judgment, the facts upon which the court based its decision are quoted in full:

"Turning now to the facts of the present case, we find that the draft guarantee was prepared by the respondent's attorneys in Johannesburg. The document was sent by the respondent to Cooper [the respondent's representative] who had several copies made for the several guarantors. The signed copies were all correct with the exception of the one signed by the appellant. I think there can be no doubt that the respondent intended to obtain, and until the error was discovered thought it had obtained, a guarantee in the form prepared by its attorneys, and not what the learned trial Judge rightly described as the commercially absurd document actually signed by the appellant. As regards the appellant ... I agree with the learned trial Judge in his finding that the appellant 'was aware at all material times that what was desired of him by his brother [a partner in Gabbe & Meyer] and what he gave was a guarantee for £250 for the benefit of the creditors.' The document in question is dated 2nd July, 1934, but it is common cause that it was actually signed by the appellant on the 4th July or some days later. On the evening of the 3rd July the appellant visited Marais, who is an attorney but was consulted merely as a friend. According to Marais the appellant was reluctant to sign any guarantee. From Marais' house the appellant went to his brother, Christiaan, the partner in the firm of Gabbe & Meyer. Christiaan was not called as a witness, but appellant admits that he tried to persuade him to sign the guarantee, and we can take it that he was successful in his persuasions, for the same evening the appellant wrote a letter to Marais as follows:

'Omtrent die garansie vir Gabbe en Meyer. Ek belowe om die waarborg vir £250 to teken mits daar verdere garansies vir £750 alreeds geteken is en die ooreenkoms tussen Gabbe en Meyer en die krediteurs tot ons satisfaksie sal wees. Ek sal u môre oplui en sake verder bespreek.'

There was no further consultation with Marais, the next step being the signature of the document by the appellant in Marais' office. In his evidence the appellant stated that he merely agreed with his brother Christiaan to sign the document produced by the latter, and that he signed it without reading it and without troubling about its contents. On further examination he had to admit that he knew that the creditors of the firm wanted guarantors to the amount of £1,000 (a fact moreover which appeared from the opening words of the guarantee), that each of the partners had to get £500 worth of guarantees, that Christiaan was looking for guarantors, and that Christiaan wanted the appellant to be one of the guarantors. After a good deal of hedging in cross-examination he admitted that he knew the document was for £250, and in reply to a question from the Bench that he knew on the evening of the 3rd July that it was a guarantee for £250 that he had to sign.²²⁹

²²⁹ 257-258.

It was argued on behalf of the appellant that the document could not be rectified because the respondent had failed to prove the existence of a prior agreement regarding the appellant's liability, and was merely relying on a common intention of the parties prior to recording the agreement in writing.²³⁰

While the court agreed that the respondent was relying on a common intention, it did not agree with the contention that the respondent's claim for rectification should fail for that reason. It held:

"Proof of an antecedent agreement may be the best proof of the common intention which the parties intended to express in their written contract, and in many cases would be the only proof available, but there is no reason in principle why that common intention should not be proved in some other manner, provided such proof is clear and convincing."²³¹

It is not entirely certain what the court intended to convey in this statement about the meaning of the concept "common intention". Viewed in isolation, it seems to suggest that there is no conceptual distinction to be drawn between an antecedent agreement and a common intention²³² and that an agreement is only one way to prove the existence of a common intention. A common intention could also be inferred, for example, from surrounding circumstances.²³³ This suggests that the only difference between a prior agreement and a common intention is that the former is articulated verbally, while the latter remains unexpressed and amounts to tacit consensus.

This also appears to be the reasoning underlying the following statement by De Wet:

"Vir verbetering is dit selfs nie nodig dat daar 'n regtens bindende ooreenkoms moes bestaan het voordat die afspraak op skrif gestel is nie ... Dit is selfs nie nodig dat daar 'n in woorde

²³⁰ 250.

²³¹ 253.

²³² This is also an impression created in Van der Merwe et al *Contract* 154 where it is stated that "[p]roof of a prior or antecedent agreement ('common intention') on the terms of the contract is a sufficient basis for rectification." (Footnote omitted).

²³³ See eg the court's discussion of *United States v Motor Trucks Ltd* [1924] AC 196, where De Wet CJ states that "[t]he common intention ... was deduced from the surrounding circumstances" (*Meyer v Merchant's Trust Ltd* 1942 AD 244 256).

geformuleerde voorafgaande afspraak tussen partye bestaan het nie. Ook waar die afspraak vir die eerste keer in die skriftelike stuk in woorde geformuleer word, kan dit nog verbeter word indien die stuk die bedoeling van die partye foutief weergee of formuleer.”²³⁴

However, when examined in the context of other passages in the judgment, it is possible to interpret the *Meyer* judgment as suggesting that there is a very real difference between an actual agreement and a common intention, which is not solely related to the means of proof.

For example, the court referred with approval to a statement by the American Law Institute to the effect that

“[w]here both parties have an identical intention as to the terms to be embodied in a proposed ... contract ... and a writing executed by them is materially at variance with that intention, either party can get a decree that the writing shall be reformed so that it shall express the intention of the parties, if innocent third parties will not be unfairly affected thereby.”²³⁵

The opening line of this quotation implies that rectification of an agreement, at least in the United States, is also possible where both parties’ subjective intentions happen to be identical; in other words consensus, which exists only if “the persons expressing the intentions are aware that their minds have met”,²³⁶ is unnecessary.

In the course of its judgment, the court in *Meyer* also referred to *United States v Motor Trucks Ltd*²³⁷ and pointed out that the conclusion in that case, to the effect that there must be “an actually concluded agreement antecedent to the instrument which is sought to be rectified”²³⁸ did not correspond to the actual reasoning in the judgment.²³⁹ To illustrate, the court stated that

²³⁴ De Wet & Van Wyk *Kontraktereg* 1 30. See also Tager 1977 *SALJ* 11 who interprets *Meyer v Merchant’s Trust Ltd* 1942 AD 244 as concluding that it is sufficient to prove that the parties came “to a complete mutual understanding of all the essential terms of their bargain” (footnote omitted).

²³⁵ *Restatement of the Law of Contracts II* (1932) § 504.

²³⁶ Van der Merwe et al *Contract* 20.

²³⁷ [1924] AC 196.

²³⁸ 200.

²³⁹ *Meyer v Merchant’s Trust Ltd* 1942 AD 244 256.

“the learned Judge [in *United States v Motor Trucks Ltd* [1924] AC 196] proceeded to say that the question in issue was ‘whether or not it was the intention of the parties that the land and buildings, which had been paid for, should be inserted in the schedule.’ He examined the facts to determine the separate intention of each party, and came to the conclusion that both parties intended that the land and buildings should be included, and that therefore the appellant was entitled to rectification of the schedule to the agreement. Nowhere in the judgment is there any allusion to a preceding agreement in respect of the land and buildings. The common intention that the land and buildings should be included was deduced from the surrounding circumstances, and more particularly from the fact that the payments to the respondent company by the appellant had included sums in respect of these lands and buildings.”²⁴⁰

Again, the implication is that rectification is possible even in the absence of a meeting of the minds because, according to De Wet CJ, the judge in the *United States* case “examined the facts to determine the separate intention of each party, and came to the conclusion that both parties intended that the land and buildings should be included”. This also appears to be what the court did in *Meyer*: in the facts quoted previously, there was no indication that the respondent (acting through its representative) and the appellant had communicated their subjective understanding of the terms upon which they were contracting to each other in such a manner that there could have been a meeting of the minds. A “common intention”, on these facts, appears to have been found by looking at each party’s respective intention, as inferred from the evidence presented to the court. Because these intentions corresponded (even though the parties were not aware of this), there was a “common” intention which was not reflected in the guarantee, thus entitling the respondent to have the document rectified.

At this point, it should be noted that the court also cited other authority, rather selectively, as supporting its argument that proof of a prior common intention is sufficient for a claim for rectification.

For example, the court referred to a statement by Wigmore²⁴¹ which purportedly confirms its conclusion:

²⁴⁰ 257.

²⁴¹ 254.

“Written contracts are not necessarily preceded by oral ones; the moment of assent, and thus of the beginning of the obligation, to the terms as finally settled upon may be the moment of signature of the writing – as in numerous negotiations by mail; and in such instances it is equally possible ... for an erroneous term to be inserted in the draft at the last moment. The correction of erroneous instruments therefore does not rest necessarily upon any assumption that a prior completed contract is being enforced ...”.²⁴²

It is not entirely clear how this relates to the court’s argument that a prior common intention is sufficient for rectification. The quoted statement is made in response to the incorrect view of rectification as the enforcement of an oral contract.²⁴³ It is for this reason that the observation is made that a written contract is not necessarily preceded by an oral contract and that rectification, for that reason, cannot be regarded as the enforcement of an oral contract. If anything, this quotation supports the notion that a written contract (which reflects “the moment of assent, and thus the beginning of the obligation”) may be corrected to reflect a prior oral agreement (“the terms as finally settled upon”); it does not go so far as to support rectification of a document to conform to a prior common intention.

This selective use of sources is also evident in the court’s reference to two English cases, *Shipleigh Urban District Council v Bradford Corporation*²⁴⁴ (“*Shipleigh*”) and *Crane v Hegeman-Harris Co Inc*²⁴⁵ (“*Crane*”) as indicating that it is also sufficient in English law to prove a prior common intention, rather than agreement, in order to succeed with a claim for rectification.²⁴⁶ While it is true that a reference was made to the “concurrent intention of the parties” in *Shipleigh*,²⁴⁷ a close reading of the facts indicates that the court was in fact being asked to rectify a document in accordance with a prior oral agreement which was

²⁴² Repeated in Chadbourn *Evidence* 9 § 2417(3).

²⁴³ §2417(3).

²⁴⁴ [1936] Ch 375.

²⁴⁵ [1971] 1 WLR 1390 (the judgment was initially reported as *Crane v Hegeman-Harris Co Inc* [1939] 1 All ER 662, but was re-reported in 1971, after it was pointed out in *Prenn v Simmonds* [1971] 1 WLR 1381 1389 that the original report omitted several pages of the judgment. However, that portion of the judgment which was relied upon in *Meyer v Merchant’s Trust Ltd* 1942 AD 244 (quoted further in the main text) appears in both the original and revised report.

²⁴⁶ *Meyer v Merchant’s Trust Ltd* 1942 AD 244 255. This point was, in fact, only authoritatively decided in *Joscelyne v Nissen* [1970] 2 QB 86.

²⁴⁷ *Shipleigh Urban District Council v Bradford Corporation* [1936] Ch 375 397.

void because it had not been sealed.²⁴⁸ It was therefore not concerned with the question whether a document may be rectified to conform to a prior common intention, but rather whether a written contract which had to comply with statutory formalities might be rectified in accordance with a prior agreement which did not. The quotation from the *Crane* case is equally selective.²⁴⁹ The court there did indeed state that proof of a common continuing intention was sufficient for rectification, but it then went on to state that

“if one finds that, in regard to a particular point, the parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with that common agreement, then this court has jurisdiction to rectify, although it may be that there was, until the formal instrument was executed, no concluded and binding contract between the parties.”²⁵⁰

The use of these sources is puzzling and can mean one of two things. Either the court in *Meyer* did not conceive of a common intention as something different from an agreement (other than the way it may be proved), in which case the court's conclusion does not appear to be supported by the facts. Or the court was intentionally selective in its use of sources, in which case a common intention is not the same as a meeting of the minds – such a conclusion is supported by the facts, but is wholly at odds with the generally accepted basis of contractual liability.

Subsequent case law does not clarify the matter. In *Humphrys v Laser Transport Holdings Ltd*²⁵¹ (“*Humphrys*”) the first respondent bought a company that transported and rigged heavy equipment and machinery. Because its original business had been the removal, packing and storage of furniture and household effects, it sought to retain the services of the appellant, who had previously managed the company bought by it.²⁵² It therefore concluded a written contract of employment and a restraint of trade which restrained the appellant from carrying on any business related to furniture removal, packing and storage.²⁵³ The first respondent alleged that the restraint of trade was incorrect, and

²⁴⁸ 392-393.

²⁴⁹ *Meyer v Merchant's Trust Ltd* 1942 AD 244 255.

²⁵⁰ *Crane v Hegeman-Harris Co Inc* [1971] 1 WLR 1390 1391.

²⁵¹ 1994 4 SA 388 (C).

²⁵² 390I-391C.

²⁵³ 391F.

should have prohibited the appellant from carrying on any business related to the transportation and rigging of heavy equipment and machinery.

From the evidence presented to the court, it was clear that the representative of the first respondent and the appellant had discussed, during negotiations, that the restraint would relate to the transportation and rigging of heavy equipment and machinery.²⁵⁴ Although the other terms of the restraint were only discussed in general terms,²⁵⁵ it appeared that on this point at least, the parties had reached agreement.

Nevertheless, the court stated that

“[w]e agree ... that, on [the representative for the respondent’s] evidence, there was no binding antecedent oral agreement between [the appellant] and [the representative]. [H]owever, ... [the] respondents never relied on an antecedent oral agreement as the basis for their claim for rectification. According to the evidence of [the representative], the parties intended that a binding restraint agreement would only come into existence upon signature of a written agreement. Respondents’ claim for rectification is based on the common intention of the parties regarding the nature of the business to which the restraint would relate.”²⁵⁶

In this case, the court appeared to favour the interpretation of a “common intention” as amounting to a tacit consensus. However, in *Dormell Properties 282 CC v Renasa Insurance Co Ltd and Others NNO*²⁵⁷ the court appeared to favour the second possible interpretation of the meaning of a “common intention”, namely the subjective intentions of the parties which have not been communicated to each other, but which correspond.

A construction guarantee was given by the first respondent to a company responsible for a development project. The company eventually converted into the appellant close corporation, and the appellant sought to have the construction guarantee rectified so that it would be identified as the party in whose favour the guarantee had been given.²⁵⁸ It alleged that the common intention was always that the guarantee would be in favour of the

²⁵⁴ 394A-C.

²⁵⁵ 398D.

²⁵⁶ 398E-F.

²⁵⁷ 2011 1 SA 70 (SCA).

²⁵⁸ Paras 2-3.

employer of the building contractor responsible for the development and that the exact identity of the employer was irrelevant to the guarantor because it had received sufficient securities from the building contractor to protect its position.²⁵⁹ The guarantor however, disputed this and argued that there had never been any consensus prior to the conclusion of the guarantee that its purpose would be to benefit the employer of the building contractor.²⁶⁰

The court concluded that the appellant and first respondent could not have agreed upon the identity of the employer because the first respondent had never been aware of the fact that the employer company had been converted to the appellant close corporation.²⁶¹ The first respondent, in fact, had been informed by a broker of the particulars of the party (a company) in whose favour the guarantee had to be issued.

However, after referring to the *Meyer* decision with approval, the court held that the common intention of the parties was indeed that the guarantee should benefit the employer of the contractor so that it would have sufficient funds to complete the development project, irrespective of the actual identity of the employer.²⁶² It is suggested here, as in *Meyer*, that there was no actual meeting of the minds between the parties – “common intention” could only have meant that the respective subjective intentions of the parties coincided.

The exact import of the *Meyer* decision therefore appears to be uncertain. It is clear from the judgment that the best evidence of a common intention is an articulated agreement representing the parties’ meeting of the minds. However, it is unclear from the judgment what a prior common intention means in the absence of an articulated consensus. On one interpretation, it could simply mean a tacit meeting of the minds, inferred from the surrounding circumstances. On another, it could mean the uncommunicated (albeit not

²⁵⁹ Para 17.

²⁶⁰ Para 34.

²⁶¹ Paras 33, 51.

²⁶² Paras 37, 52.

unexpressed), subjective intentions of the parties, inferred from the evidence presented to the court, which correspond up until the moment of contract conclusion.²⁶³

This difficulty in determining the meaning of the prior common intention requirement has also been experienced in common-law jurisdictions. It was eventually authoritatively decided in the English decision of *Joscelyne v Nissen*²⁶⁴ (“*Joscelyne*”) that proof of a prior common intention would suffice for a successful claim for rectification. In this case, a father and daughter had negotiated that the father would transfer his business to his daughter, in return for which she would pay him a weekly pension as well as pay for his household expenses, including his gas, electricity and coal bills. The court pointed out that

“it was expressly agreed and intended that these particular items should be paid for by the daughter as such expenses and that [the parties] negotiated upon that footing: it is not disputed that father and daughter continued in this expressed accord thereafter and when they signed the agreement still intended that it should provide for such payment.”²⁶⁵

By mistake, the responsibility for these bills was never indicated in the contract. When the father sought to have the written agreement rectified, it was argued on behalf of the daughter that there was no prior valid contract in terms of which the document could be rectified.²⁶⁶ After examining earlier case law, the court confirmed the conclusion reached in the *Shingley* and *Crane* cases to the effect that a common continuing intention is sufficient, but added a qualification: there must be “some outward expression of accord”.²⁶⁷ Since the court itself found that the parties had agreed upon the fact that the daughter would be responsible for payment of the bills, it is difficult to determine whether it considered the need to prove a prior common intention and an outward expression of accord as constituting aspects of one requirement, or as two separate requirements.

²⁶³ The fact that a prior agreement or common intention must continue until the moment of contract conclusion is not discussed in *Meyer v Merchant's Trust Ltd* 1942 AD 244. However, this is indeed a requirement, as is evident from cases like *Rand Bank Ltd v Rubenstein* 1981 1 All SA 1 (W) 5; *Benjamin v Gurewitz* 1973 1 SA 418 (A) 424F-G.

²⁶⁴ [1970] 2 QB 86.

²⁶⁵ 90.

²⁶⁶ 90.

²⁶⁷ 98.

Bromley argues that the Court of Appeal was incorrect in adding the additional qualification.²⁶⁸ He points out that historically, it was never a requirement that the parties' subjective intentions be communicated to each other before a document could be rectified.²⁶⁹ The only role that such an outward accord may fulfil is to assist in discharging the burden of proof.²⁷⁰ However, Smith argues that the court in *Joscelyne* did nothing more than to confirm the objective common-law approach to determining whether consensus between the parties has been reached.²⁷¹ On such an interpretation, there is no difference between a prior common intention of which there is some outward expression of accord and an agreement.

A middle way appears to be represented by certain Australian and New Zealand cases.²⁷² A particularly instructive case on the meaning of "an outward expression of accord" is that of *Ryledar Pty Ltd v Euphoric Pty Ltd*²⁷³ ("*Ryledar*") in which Cambell JA held the following:

"[W]hen the fundamental requirement for granting rectification is a continuing common intention of the parties, it is of more assistance to concentrate on what is needed before an intention of the parties to a negotiation counts as a common intention. In my view, when that intention relates to the terms upon which they will contract with each other, it is still necessary for them to know enough of each other's intentions for it to be said that there is a common intention. They might come to know of each other's intentions in this way through those intentions being directly stated, or they might come to know of them through the various other means by which one person's intention can become known to another person. Those means can sometimes involve a process of conscious and deliberate inference. Those means can sometimes involve simply perceiving a gestalt in a series of events. Those means can depend to some extent on the people involved sharing a common understanding of how particular bodies of knowledge or markets or social institutions they are operating in work - the experienced surgeon, or the experienced chess player, can sometimes see what another surgeon, or chess player, is seeking to do, in a way that an inexperienced person cannot. What matters for present

²⁶⁸ "Rectification in Equity" (1971) 87 LQR 532.

²⁶⁹ 532.

²⁷⁰ 538.

²⁷¹ "Rectification of Contracts for Common Mistake, *Joscelyne v Nissen*, and Subjective States of Mind" (2007) 123 LQR 116 122-123.

²⁷² See eg *NSW Medical Defence Union Ltd v Transport Industries* (1986) 6 NSWLR 740; *Bishopsgate Insurance Australia Ltd v Commonwealth Engineering (NSW) Ltd* (1981) 1 NSWLR 429; *Ryledar Pty Ltd v Euphoric Pty Ltd* [2007] NSWCA 65; *Westland Savings Bank v Hancock* [1987] NZLR 21.

²⁷³ [2007] NSWCA 65.

purposes is that for a negotiating party to perform actions or say words from which the other party can gather his or her intention is itself a form of communication. Negotiation of any contract takes place in a context in which various facts are known or assumed by the negotiating parties. Sometimes, for example, if a contract is negotiated in a context where there are well understood business practices and conventions, and nothing is said about those practices and conventions not applying, it can be legitimate to conclude that both parties to the contract intended to act in accordance with those practices and conventions, even if they did not expressly communicate to each other that they intended to act in accordance with those practices and conventions. This view of what is needed before an intention is a common intention, accords, it seems to me, with the Australian case law since *Joscelyne*.²⁷⁴

In other words, while Australian law focuses on the subjective intentions of the parties, there must be some form of communication of these intentions between the parties before there is a “common intention”. This corresponds with the first possible interpretation of the *Meyer* judgment, namely that a common intention is simply consensus inferred from surrounding circumstances. This would also correspond with the interpretation of the requirement in the *Humphrys* case.

However, the facts of the *Meyer* judgment do not fit squarely into this approach. There the parties had never communicated their intentions to each other in a manner that could lead one to say that there was a tacit agreement between the parties not reflected in the written document. The court’s conclusion that there was a common intention seems to be closer to Bromley’s argument than it does to either the English or Australian approach. The parties each intended that the guarantor would be liable for a certain amount; these respective subjective intentions were never communicated to each other, but there was “clear and convincing proof” that these intentions corresponded.²⁷⁵ In other words, the distinction between the Australian and South African approach, on this interpretation, lies in what is accepted as proof of the common intention of the parties. According to *Ryledar*, a common intention only arises if the parties’ subjective intentions have been communicated to each other in some form or another. The implication of the *Meyer* case,

²⁷⁴ Para 281.

²⁷⁵ *Meyer v Merchant’s Trust Ltd* 1942 AD 244 253. The fact that the evidence of the parties’ common intention must be “clear and convincing” does not mean that the onus on the party seeking rectification is more than a balance of probabilities, but rather that the claim is difficult to prove - see *Bardopoulos and Macrides v Miltiadows* 1947 4 SA 860 (W) 863-864.

by contrast, is that this proof may also be found in objective evidence of each party's intention, but that this intention need not have been communicated. Smith has stated that

"there is no reason why the parties should, in proving their subjective intentions, be confined to materials crossing the line. One can see good policy sense in refusing to admit ex post facto recollection: the temptation to invent, gild or embellish, even unconsciously, will be too great. But materials not subject to such difficulties – e.g. documents which unequivocally manifest a party's intention, but which do not cross the line – do not suffer from this disadvantage."²⁷⁶

Although the notion that a written agreement can be rectified on the basis of the parties' subjective intentions which have never been communicated to each other is peculiar, it should be borne in mind that the court in *Meyer* did not rectify the suretyship on the basis of mere unmanifested intentions. To do so would have meant that the document was being corrected when there was no demonstrable "common" intention. The purpose of rectification is to reflect the parties "common" intention in the written document on the basis that it would be unconscionable for one party to enforce the written agreement as it stands. However, this unconscionability does not, and cannot, arise where no "common" intention can be found.²⁷⁷

If the court in *Meyer* intended the concept of a common intention to denote something less than consensus, then the question remains as to what impact this has for agreements subject to formalities. Should a court only rectify an agreement subject to formalities when there is evidence of a prior oral agreement (whether express or tacit) or should it also be permitted to do so when only a prior common intention has been proved? Taking into account that there must be objective proof of each party's intention and that these intentions must correspond, and the qualification that such proof should be clear and convincing, the possibility for fraud and perjury is minimised. There should therefore be no reason why an agreement subject to formalities should not be rectified in order to correspond to the parties' prior common intention, provided the proof is convincing.

In view of this gradual relaxation of the prior valid contract requirement, it is appropriate to re-consider the decision in *Magwaza*. By concluding that an agreement subject to formalities must appear to be formally valid *ex facie* its recordal before it can be rectified,

²⁷⁶ 2007 LQR 125.

²⁷⁷ *Ryledar Pty Ltd v Euphoric Pty Ltd* [2007] NSWCA 65 para 315.

the court unwittingly seemed to re-introduce the prior valid contract requirement for these types of agreements. This first step seems to be particularly illogical when it is considered together with the second step and the fact that it is sufficient to prove the existence of a prior common intention in order to succeed with a claim for rectification.

In the absence of the antecedent requirement of *ex facie* compliance, could the court in *Magwaza* have rectified the parties' written agreement? Probably not. The document recording the agreement provided that the precise boundaries of the land sold would be depicted in a diagram to be attached. Such a diagram never eventuated.²⁷⁸ However, another diagram was eventually drafted by a surveyor appointed by the purchaser, but the boundaries of the land thus surveyed were wholly at variance with the description of the land in the document.²⁷⁹ The purchaser sought rectification of the document so that the description of the land there was in accordance with this diagram.

While the purchaser may have intended that some of the boundaries of the land would be fixed by a surveyor, there was insufficient evidence to indicate that this intention was shared by the seller. It would therefore have been impossible for the purchaser to prove that the parties shared a common intention to sell the land as identified by the surveyor in his diagram.²⁸⁰ A similar flaw characterises the agreement of the parties in the *Dowdle* case.²⁸¹

In both these cases, rectification would have been inappropriate, not because the parties failed to record an essential term of their agreement, but because they had neither agreed upon (whether expressly or tacitly) nor shared a common intention with respect to that essential term. Rectification, if granted, would have resulted in the judicial creation of an agreement for the parties, rather than the correction of an error in its recordal.

Before proceeding to a discussion of the requirement of mistake, brief mention should be made of the fact that a prior common intention is not always a prerequisite for a successful

²⁷⁸ *Magwaza v Heenan* 1979 2 SA 1019 (A) 1022A.

²⁷⁹ 1022F.

²⁸⁰ *Republican Press (Pty) Ltd v Martin Murray Associates CC* 1996 2 SA 246 (N) 257H-J per Squires J.

²⁸¹ *Dowdle's Estate v Dowdle* 1947 3 SA 340 (T) 348 read with 355. The same argument is also made in *Republican Press (Pty) Ltd v Martin Murray Associates CC* 1996 2 SA 246 (N) 258A-D per Squires J; Tager 1977 SALJ 13-14.

claim for rectification. It is also possible to rectify a written agreement where one party is mistaken, provided that the other party is aware of that mistake but does nothing to correct it. In such a case, one cannot argue that the rectification of the document is in accordance with a common intention in the true sense, but rather that it is in accordance with one party's intention, coupled with the reasonable reliance that the other party has shared the same intention.²⁸²

5 4 3 The requirement of "mistake"

Traditionally, a document will be rectified when it fails to record the parties' agreement as a result of a common mistake of both parties, or the unilateral mistake of one party where the other party was aware of that mistake, but failed to draw the mistaken party's attention to it in order to secure an advantage.²⁸³ It is not a requirement that the mistake should be reasonable, and carelessness in the recording of the agreement should therefore not preclude a claim for rectification.²⁸⁴ To the extent that the majority judgment in *Republican Press* seems to suggest otherwise, by implying that a creditor should exercise greater care in drafting a suretyship document and that a court will not rectify a document when it does not exercise such care, this statement cannot be supported.²⁸⁵

²⁸² See eg *Benjamin v Gurewitz* 1973 1 SA 418 (A) 424F-H, 425D; E Kahn "Rectification where Defendant Omits Term from Written Contract" (1957) 74 SALJ 127 130; Tager 1977 SALJ 11; Bamford 1963 SALJ 530.

²⁸³ In other words, a unilateral mistake caused by the other party's unconscionable conduct. *Weinerlein v Goch Buildings Ltd* 1925 AD 282 291 per De Villiers JA, 293 per Wessels JA and 294 per Kotze JA; *Benjamin v Gurewitz* 1973 1 SA 418 (A) 426A; *Otto v Heymans* 1971 4 SA 148 (T) 156E-H; *Humphrys v Laser Transport Holdings Ltd* 1994 4 SA 388 (C) 396E; *Brits v Van Heerden* 2001 3 SA 257 (C) 266I. The statement in *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 3 SA 234 (A) 238D per Harms AJA that rectification is precluded when there is a unilateral mistake fails to take into account that there are different types of unilateral mistakes, not all of which preclude a claim for rectification. A unilateral mistake in the narrow sense exists when one party is mistaken and the other is aware of that mistake; however, South African courts are inclined to characterise as unilateral mistake, situations where the other party is unaware of the former's mistake and is therefore himself mistaken about the former's intention (in other words, a mutual rather than a unilateral mistake) – see Van der Merwe et al *Contract* 25.

²⁸⁴ See eg De Wet & Van Wyk *Kontraktereg* 1 29-30; Van der Merwe et al *Contract* 156-157; *Offit Enterprises (Pty) Ltd v Knysna Development Co (Pty) Ltd and Others* 1987 4 SA 24 (C) 28F-G; *Humphrys v Laser Transport Holdings Ltd* 1994 4 SA 388 (C) 399A-I.

²⁸⁵ See 5 3 2 1 1 above.

However, there have been a number of cases which suggest that the courts pay mere lip service to the requirement of a mistake in the written recordal of the parties' intention, and do not in fact apply it in practice. One of the earliest of these cases is *Mouton v Hanekom*²⁸⁶ ("*Mouton*"). In that case, the respondent had been suffering financial difficulties and in return for a loan from the appellant, agreed that his (the respondent's) farm would be transferred into the appellant's name. This agreement was reduced to writing. The parties also agreed that upon repayment of the loan and transfer costs, the appellant would re-transfer the farm to the respondent. This agreement, however, was deliberately excluded from the written agreement of sale.

Before turning to a discussion of the court's judgment, it should be pointed out that at the time of conclusion of the written agreement, no formalities were prescribed for sales of land in the Cape.²⁸⁷ It has been suggested that the written agreement between the parties was a simulation,²⁸⁸ and that the actual intention was to conclude a *fiducia cum creditore contracta*²⁸⁹ – the agreement to re-transfer the land would then not have had to be in writing in any event, at least in terms of current legislation.²⁹⁰ However, it is argued that although the parties could have structured their agreement in this way, there was no indication that their actual intention was any different to their purported intention nor was there any suggestion that the parties had some ulterior motive to disguise the true nature of their agreement.²⁹¹ For this reason, the following discussion proceeds on the

²⁸⁶ 1959 3 SA 35 (A).

²⁸⁷ See ch 2 (2 2).

²⁸⁸ Lubbe & Murray *Contract* 220 n 7.

²⁸⁹ G F Lubbe & T J Scott "Mortgage and Pledge" in W A Joubert & J A Faris (eds) *LAWSA* 17(2) 2 ed (2008) para 325 n 4. A *fiducia cum creditore contracta* is an out-and-out transfer of a right to a creditor as security, subject to a contractual obligation to re-transfer the right upon repayment of the loan.

²⁹⁰ See A D J van Rensburg & S H Treisman *The Practitioner's Guide to the Alienation of Land Act* 2 ed (1984) 25.

²⁹¹ *Mouton v Hanekom* 1959 3 SA 35 (A) 38H-39A. In *Zandberg v Van Zyl* 1910 AD 302 309, Innes J stated that

"as a general rule, the parties to a contract express themselves in language calculated without subterfuge or concealment to embody the agreement at which they have arrived. They intend the contract to be exactly what it purports; and the shape which it assumes is what they meant it should have. Not infrequently, however, (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it a shape, intended not to express but to

assumption that the parties did intend to conclude a written contract of sale and an oral *pactum de retrovendo*.²⁹²

In *Mouton*, the court was not prepared to decide whether this collateral oral agreement was inconsistent with the written sale agreement (in which case its proof would have been excluded by virtue of the parol evidence rule)²⁹³ but held that even if it were, the respondent was entitled to succeed with a claim for rectification. In response to counsel's contention that the agreement could not be rectified because the parties were not labouring under a mistake at the time when they executed the document but had deliberately excluded the *pactum de retrovendo*, the court held the following:

“Die feit dat die partye uitdruklik ooreengekom het dat die ooreenkoms van terugkoop nie in die koopbrief vermeld sal word nie kan rektifikasie nie verydel nie. Die gemeenskaplike bedoeling van beide partye was dat eiser die reg van terugkoop sal hê en as daar dan bepalings of woorde in die koopbrief is wat hierdie bedoeling onuitvoerbaar maak of in stryd daarmee is, dan is dit duidelik dat sodanige bepalings of woorde deur die partye per abuis ingeskryf is en is eiser geregtig op rektifikasie van die koopbrief ten einde dit in ooreenstemming te bring met die gemeenskaplike bedoeling van beide van die partye.”²⁹⁴

The basis of the court's decision appears to be that where there is a discrepancy between the parties' prior intention or agreement and the document recording that agreement, the latter may be corrected to give effect to the former, even in the absence of a mistake in the recordal of that agreement.²⁹⁵ Although the *Mouton* decision seemed to have abolished the mistake requirement, Trollip J held that this was not so in the subsequent case of *Von*

disguise its true nature. And when a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is; not what it in form purports to be. [But] [t]he Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. For, if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances that the same object might have been attained in another way will not necessarily make the arrangement other than it purports to be.”

²⁹² It follows from the discussion of *pacta de contrahendo* in ch 3 (3 2 1) that if a court were to be confronted with the same type of facts today, the *pactum de retrovendo* (or at least that part of it relating to the substantive offer) would have had to be in writing to be formally valid.

²⁹³ *Mouton v Hanekom* 1959 3 SA 35 (A) 39E-F.

²⁹⁴ 39H-40A.

²⁹⁵ Liebenberg 1994 *Obiter* 142.

*Ziegler v Superior Furniture Manufacturers (Pty) Ltd*²⁹⁶ (“*Von Ziegler*”). While the judge acknowledged that the parties were not mistaken when they deliberately omitted the *pactum* from their written agreement,

“their mistake (on the basis of the assumption made by the Appellate Division) was that their written contract was worded in such a way as to exclude their oral agreement from operating together with their written contract. That was contrary to their common intention or oral agreement, and it was that mistake in their written contract that was allowed to be rectified.”²⁹⁷

It is true that the court in *Mouton* stated that the parties shared the common intention that the plaintiff would have a right to re-purchase the farm and that “as daar dan bepalings of woorde in die koopbrief is wat hierdie bedoeling onuitvoerbaar maak of in stryd daarmee is, dan is dit duidelik dat sodanige bepalings of woorde deur die partye per abuis ingeskryf is”.²⁹⁸ However it is unclear how the court could have come to the conclusion that the parties had “per abuis” included certain terms or words in the written document which would have made their common intention unenforceable. The terms of the written agreement were exactly as the parties intended.²⁹⁹ Furthermore, the courts in *Mouton* and in *Von Ziegler* seemed to ignore the fact that the parties had been informed by their legal advisor that the *pactum* should have been included in their written agreement.³⁰⁰

Nevertheless, both the *Mouton* decision and Trollip J's interpretation of that decision in *Von Ziegler* have been held to be correct by the Supreme Court of Appeal in *Tesven CC v South African Bank of Athens*³⁰¹ (“*Tesven*”). The parties in *Tesven* had drawn up deeds of suretyship which failed to include oral suspensive conditions that the appellant's liability would only arise in certain circumstances. The appellant asked that the suretyship be

²⁹⁶ 1962 3 SA 399 (T).

²⁹⁷ 411B-C.

²⁹⁸ *Mouton v Hanekom* 1959 3 SA 35 (A) 39H-40A.

²⁹⁹ See J L Buchanan “Relaxation of the Parol Evidence Rule” (1959) 76 SALJ 271 273 and also De Wet & Van Wyk *Kontraktereg* 1 30 n 91 who state:

“Dat die skriftelike stuk in hierdie geval nie ‘verbeter’ kan word nie, behoort vanself te spreek, want dit was nooit die bedoeling dat die skriftelike stuk anders moes wees as wat dit is nie”.

³⁰⁰ See *Mouton v Hanekom* 1959 3 SA 35 (A) 38G and the discussion of both this case and *Von Ziegler v Superior Furniture Manufacturers (Pty) Ltd* 1962 3 SA 399 (T) in Van der Merwe et al *Contract* 156 n 210.

³⁰¹ 2000 1 SA 268 (SCA).

rectified,³⁰² not because its representative was mistaken as to the contents of the document, but because she had mistakenly believed that the prior oral agreements would operate in conjunction with the written agreement.³⁰³

The court rejected the argument that

“for a claim for rectification to be competent the mistake relied on must relate to the writing in the document ... [T]hat a court cannot have regard to any other kind of mistake is not supported by authority nor is there any reason based on principle that can be relied on in support of it. ... To allow the words the parties actually used in the documents to override their prior agreement or the common intention that they intended to record is to enforce what was not agreed and so overthrow the basis on which contracts rest in our law: the application of no contractual theory leads to such a result.”³⁰⁴

On this basis, the court confirmed that the decision in *Mouton* was correct and that the *ratio* of that case, as interpreted by Trollip J in *Von Ziegler*, was directly applicable to the facts before it.³⁰⁵

The implication of the *Tesven* judgment is that while a mistake is required before rectification can occur, that mistake may be in the recordal of the parties' agreement or common intention, but could also be a mistake as to the effect of the written document and the fact that it precludes the oral agreement from operating in conjunction with the written one.³⁰⁶ It appears that the existence of such a mistake is inferred from the fact that there is a discrepancy between the parties' prior intention or agreement and the document

³⁰² S Cornelius “Rectification of Contracts and Evidence of Prior Oral Agreements” 2000 *TSAR* 563 565-566 states that evidence of these suspensive conditions could have been tendered without a claim for rectification, because such evidence would not have contravened the parole evidence rule. While it is true that evidence of suspensive conditions is admitted on certain occasions, Cornelius's suggestion does not take into account that such evidence is not permitted when it would amount to a variation of an agreement subject to formalities which on its face appears to be unconditional and which, after *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 2 SA 15 (A), is tendered in order to rely on the written agreement as varied (rather than to prove that the agreement is formally invalid). There was nothing in the description of the suretyships in *Tesven CC v South African Bank of Athens* 2000 1 SA 268 (SCA) to suggest that they were anything but unconditional.

³⁰³ *Tesven CC v South African Bank of Athens* 2000 1 SA 268 (SCA) para 18.

³⁰⁴ Paras 15-16.

³⁰⁵ Paras 17-18.

³⁰⁶ Para 17.

recording that agreement. This point is addressed in *Otto v Heymans*³⁰⁷ (“*Otto*”), in which it was stated that

“of ‘mutual error’ altyd aanwesig moet wees ... skyn ... meer ‘n geval van logiese afleiding as van feitelike bewys te wees. As daar eenmaal bewys is dat albei partye ‘n volgehoue bedoeling of verstandhouding gehad het ... om ‘n ander ooreenkoms te sluit as wat in die geskrewe stuk deur hulle beliggaam is, moet ‘n afleiding van foutiewe teboekstelling *prima facie* gemaak word ... ‘Mutual error’, soos dit in die betrokke gewysdes voorkom, skyn my niks meer te wees as ‘n samevatting van die onderliggende begrip van ‘n volgehoue opset wat nie in die geskrewe kontrak volledige of juiste uiting gevind het nie.”³⁰⁸

If South African courts are prepared to rectify a written agreement simply on the basis that there is a discrepancy between the document and the parties’ prior oral agreement or common intention, the question arises as to why it is necessary to attribute such a discrepancy to a mistake, even where the parties have deliberately excluded a term from their agreement. Presumably, the answer to this question lies in the judicial attempt to navigate the tension which arises between the parol evidence rule on the one hand and rectification on the other.

The function of the mistake requirement is to prevent a party from presenting evidence of a prior oral agreement or negotiations, purportedly as the basis for a claim for rectification, but in fact amounting to an attempt to circumvent the parol evidence rule. It is true that not all instances of the presentation of extrinsic evidence arise because the parties have made a mistake in the recordal of their written agreement;³⁰⁹ however, the mistake requirement

³⁰⁷ 1971 4 SA 148 (T).

³⁰⁸ *Otto v Heymans* 1971 4 SA 148 (T) 156D-G. A similar point is made in *Offit Enterprises v Knysna Development Co* 1987 4 SA 24 (C) 27D-E (referred to in *Tesven CC v South African Bank of Athens* 2000 1 SA 268 (SCA) para 15) where Burger J states

“[w]hatever happened, once the Court is satisfied that the agreement recorded is not the same as the actual agreement arrived at the Court will grant the rectification.”

See also *Brits v Van Heerden* 2001 3 SA 257 (C) 269E; Malan *Rektifikasie* 170-177; Liebenberg 1994 *Obiter* 144-146; Kerr *The Law of Contract* 154 n 707.

³⁰⁹ Eg a party may tender extrinsic evidence to clarify further the terms of the contract or to prove that the contract is void due to a mistaken impression of the other party’s intention (which would lead to dissensus and not simply a mistake in the recordal of the agreement). These and other examples of admissible extrinsic evidence are discussed in detail in ch 4.

is a vital element in distinguishing between claims for rectification and attempts to present extrinsic evidence in an effort to vary or contradict the written agreement.³¹⁰

Thus, in the *Von Ziegler* case, Trollip J held that the parol evidence rule plays an important role in promoting certainty of transactions and, as a consequence, business efficacy.³¹¹ In order to prevent the watering down of this function, any attempt to prove the existence of an oral agreement not reflected in the written document had to be brought within the limits of rectification.³¹² One of these limits is the necessity that there should be a mistake, either in the document itself or as to its consequences. In the absence of such a mistake, evidence of the prior oral agreement or common intention amounts to evidence which varies or contradicts the document and contravenes the parol evidence rule.³¹³ Thus, while the deliberate exclusion of a term from the parties' written agreement may amount to a mistake if the parties are unaware of the consequences of that exclusion, the same cannot be said where the parties reduce their agreement to writing, with full knowledge of the consequences of all aspects of that recordal. In such a case, the exclusion of a term from that agreement would not be due to a mistake, and any attempt to prove the existence of that term would amount to an attempt to vary the written document.³¹⁴

Arguably, the *Mouton* case falls in this last category. The parties were informed by a legal advisor that the oral *pactum de retrovendendo* should be incorporated in the written agreement. The appellant replied that this was unnecessary because he and the plaintiff

³¹⁰ *Strydom v Coach Motors (Edms) Bpk* 1975 4 SA 838 (T) 841B-C.

³¹¹ *Von Ziegler v Superior Furniture Manufacturers (Pty) Ltd* 1962 3 SA 399 (T) 410A-B.

³¹² 410C.

³¹³ *Von Ziegler v Superior Furniture Manufacturers (Pty) Ltd* 1962 3 SA 399 (T) 412A-B; see also *Brits v Van Heerden* 2001 3 SA 257 (C) 282A-D and the quotation from the court *a quo*'s decision in *Tesven CC v South African Bank of Athens* 2000 1 SA 268 (SCA) para 11:

"The prior oral agreements sought to be relied upon are self-evidently in conflict with the written memorial of the various transactions. That seems to me to be classically the situation in which proof of the prior oral agreements is precluded by the parol evidence rule ... It [ie the remedy of rectification] has no application where the document correctly reflects the words which the parties intended to record, but the words so used do not correctly reflect the parties' prior agreement or common intention. The parol evidence rule precludes proof of such prior agreement or common intention if its effect would be to vary or alter the memorial of the transaction".

³¹⁴ *Brits v Van Heerden* 2001 3 SA 257 (C) 282E-F.

were family and that he would keep his promise.³¹⁵ It is therefore difficult to reconcile the court's decision to rectify the written agreement with the justification for the decision given in *Von Ziegler*. Not only was the term deliberately excluded from the written agreement, but the parties also seemed to do so with full knowledge of the consequences of the omission.³¹⁶ Why else would the appellant have indicated that it was unnecessary to include the *pactum de retrovendendo* in writing because he would keep his promise to return the land to the respondent, if not in response to information that it would not be binding in its oral form?

It appears that the true reason for the court's decision in *Mouton* was not that the parties were mistaken, but rather that the court would be giving effect to the unconscionable conduct of the appellant in that case if it refused to rectify the document. This is evident from the court's response to the contention that to allow rectification of the document on the facts before it would circumvent the parol evidence rule:

"[Daar was 'n betoog dat] 'n party tot 'n geskrewe ooreenkoms nie onder die dekmantel van rektifikasie die reëls van bewysleer kan omseil nie; dit is so, maar ewe min kan agter dieselfde reëls skuiling gesoek word vir die beoefening van bedrog of die ontduiking van 'n kontraktuele verpligting."³¹⁷

As support for this view, the court referred to a statement made by Wessels JA in the *Weinerlein* case that "the exception (*exceptio doli*) lies whenever the Court regards it as a fraudulent act to rely on your *summum jus* when you know full well that your claim is founded on a mutual error."³¹⁸

Thus, while *Mouton* has been interpreted as allowing rectification even when the mistake is as to the consequences of the deliberate exclusion of a term, it is arguable that the court was more concerned with the fact that the appellant was acting in an unconscionable manner by relying on a document which he knew did not constitute an accurate reflection of the parties' actual agreement. In order to prevent this, it allowed rectification of the written agreement, in spite of the fact that the parties had deliberately excluded a part of

³¹⁵ *Mouton v Hanekom* 1959 3 SA 35 (A) 38G.

³¹⁶ See also Van der Merwe et al *Contract* 156 n 210.

³¹⁷ *Mouton v Hanekom* 1959 3 SA 35 (A) 40A-B.

³¹⁸ *Weinerlein v Goch Buildings Ltd* 1925 AD 282 292.

their agreement from the written record, and in spite of the fact that this was probably done with full knowledge of the consequences thereof.

The *Mouton* decision therefore has profound implications for rectification, the parol evidence rule and statutory formalities. First, to rectify a document in order to include a term which has been deliberately omitted from the parties' written agreement, with full knowledge of the consequences of that omission, is not in conformity with the general proposition that rectification only corrects the document but does not vary the parties' intention.³¹⁹ It is one thing to argue that where the parties intended their written agreement to operate in conjunction with an oral agreement, and mistakenly thought that it could, rectification of the written document does not vary the parties' prior intention;³²⁰ it is another thing entirely where the parties intended to reduce their agreement to writing with full knowledge of the consequences of doing so on any prior oral agreement not recorded in that document. In such a case, the inference must be that the parties did not intend that prior oral agreement to be binding; rectification in these circumstances can amount to nothing other than an amendment of the parties' common intention and the variation of an existing agreement.³²¹

Secondly, to permit rectification of the written document in such circumstances is inconsistent with both the parol evidence rule and statutory formalities. Both preclude extrinsic evidence of a prior oral agreement or common intention when the purpose of such evidence is to vary or contradict the written agreement. It is for this reason that courts repeatedly emphasise the importance of a mistake: its presence distinguishes between claims for rectification on the one hand, and the introduction of extrinsic evidence to vary a written agreement in an attempt to circumvent the parol evidence rule and statutory formalities on the other. From this perspective, the possibility that an oral agreement or common intention may override a written agreement whenever there is a

³¹⁹ *Spiller v Lawrence* 1976 1 SA 307 (N) 310F; *Weinerlein v Goch Buildings Ltd* 1925 AD 282 289; *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd* 2001 4 SA 1315 (SCA) para 33.

³²⁰ D J Joubert *General Principles of the Law of Contract* (1987) 165.

³²¹ *Brits v Van Heerden* 2001 3 SA 257 (C) 282E-F, 283G-H.

“discrepancy” between the two, even when that discrepancy is deliberate, considerably narrows the scope of both rules.³²²

It is to prevent the circumvention of the parol evidence rule and statutory formalities, that a party must prove a mistake, in the true sense of the word, before he may succeed with a claim for rectification in common-law jurisdictions.³²³ This emphasis on the need to prove a mistake can also be traced back to the fact that historically, rectification could only be claimed in Courts of Equity. A subdivision of the equitable jurisdiction of these courts was that of fraud, accident and mistake.³²⁴ Rectification could only be ordered if it fell within the ambit of one of these grounds. These historical roots of the remedy of rectification are still evident in English law today: while a document may be rectified on the basis that the parties intended it to have a certain legal effect and mistakenly thought that it did,³²⁵ the remedy is not available if parties deliberately omitted a certain term or part of their oral agreement from the written document.³²⁶

This position is confirmed in the recent English case of *Ali Oun v Ishfaq Ahmad*.³²⁷ The respondent had agreed to sell the lease of retail and residential premises to the appellant. The terms of the agreement were recorded in two documents. The first described the property and the purchase price, as well as stipulating a sum to be paid in advance by the appellant.³²⁸ The second recorded the apportionment of the price between the premises,

³²² See eg C Palley “Rectification of Written Contracts in English and Roman-Dutch Law” (1962) 2 *RNLJ* 16 26-27; Buchanan 1959 *SALJ* 273.

³²³ Brown *Corbin on Contracts* 4 239; Peel *Contract* 221.

³²⁴ C C Turpin “General Principles of Contract” 1958 *ASSAL* 46 51; Brown *Corbin on Contracts* 4 228.

³²⁵ See eg *Re Butlin’s Settlement Trusts* [1976] Ch 251; *Swainland Builders Limited v Freehold Properties Limited* [2002] EWCA Civ 560. An example of a South African case in which the parties mistakenly thought that their transaction would have a certain legal effect is *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd* 2001 4 SA 1315 (SCA). There the parties had intended to record a written contract of sale that would be zero rated in terms of the Value-Added Tax Act 89 of 1991. However, the Act had been amended, so that a prerequisite for such zero rating was that certain additional terms also had to be in writing. The court rectified the document on the basis that the parties were ignorant of the amending legislation (para 32).

³²⁶ Brown *Corbin on Contracts* 4 239; J M Perillo *Corbin on Contracts 7: Avoidance and Reformation* §§ 27.1-29.12 (2002) 286; Peel *Contract* 195-196. See also *Grossman v Hooper* [2001] EWCA Civ 615 para 27.

³²⁷ 2008 EWHC 545 (Ch).

³²⁸ Para 4.

the fixtures, fittings, goodwill and trading stock.³²⁹ However, the parties deliberately excluded this apportionment from the first document.³³⁰ The respondent alleged that the first document did not constitute a valid contract of sale, because it failed to include all the express terms agreed upon by the parties as required by section 2(1) of the Law of Property (Miscellaneous Provisions) Act. On appeal, the appellant sought rectification of the first document.

The court acknowledged that section 2(4) of the Law of Property (Miscellaneous Provisions) Act permitted the rectification of an agreement in order to make it comply with statutory formalities governing the sale of land. However, the real issue was whether the provision permitted rectification of written agreements where certain express terms were deliberately omitted by the parties, or only those where the parties' claim met the conventional requirements of rectification.³³¹

The court considered case law which suggested that rectification was permitted where the parties had laboured under a mistake concerning the legal effect of a term or the document as a whole,³³² and held that in one sense, the appellant and respondent had made such a mistake when they thought that the first document constituted a binding contract even though it did not contain all the express terms of their oral agreement.³³³ However, in those cases where a document was rectified because of a mistake concerning the legal effect of the transaction or a term thereof, the parties had not deliberately omitted a term from their agreement. The court continued:

“[T]his express agreement to omit the term means that there is no defect or mistake in the recording of, or the expression of, the arrangement and it is beyond the ambit of rectification to write into the written agreement a term which the parties expressly agreed should not be so recorded. I reach this conclusion applying what I understand to be conventional principles as to the availability of rectification and not some special set of rules as to rectification for the

³²⁹ Para 5.

³³⁰ Paras 15, 63.

³³¹ Para 35.

³³² Paras 49-53.

³³³ Para 54.

purposes of section 2(4) of the 1989 Act. In my judgment, this approach serves the legislative objective of section 2 of the 1989 Act.”³³⁴

South African courts are not confined by the same historical origins of the remedy of rectification as their common-law counterparts. In fact, while many seem to be of the opinion that rectification was received in South African law as a necessary corollary and narrow exception to the parol evidence rule, cases like *Otto*, *Tesven* and particularly *Mouton* seem to be guided by the broader equitable nature of rectification as emphasised by civilian sources, and which is directed at preventing unconscionable behaviour.³³⁵ More importantly, they constitute examples of where an overemphasis on the importance of the certainty promoted by written agreements could have led to inequitable results and encouraged unconscionable conduct. It was noted in previous chapters that this awareness of the potential abuse of the writing requirement has led South African courts to interpret the relevant legislation imposing such a requirement more flexibly than the exact wording of that legislation and its underlying purpose may suggest.³³⁶ This awareness also appears to inform some South African courts’ approach to the remedies available to parties in the event of non-compliance with statutory formalities.³³⁷ It would seem further that the same awareness is the (implied) basis for South African courts’ approach to the requirement that there must be a “mistake” in a written agreement before it may be rectified to conform to the parties’ actual agreement or common intention.

5 5 Conclusion

This chapter has considered the South African approach to the rectification of agreements subject to statutory formalities. We have seen that it prescribes two steps before rectification can occur: first,³³⁸ there must be compliance with formal requirements *ex facie*

³³⁴ Para 55 per Morgan J.

³³⁵ See eg the reference to Wessel JA’s statement in *Weinerlein v Goch Buildings Ltd* 1925 AD 282 292 in *Mouton v Hanekom* 1959 3 SA 35 (A) 40B to the effect that it amounts to a type of fraud to enforce a written agreement which does not accurately represent the parties’ actual agreement or common intention and the emphasis in *Otto v Heymans* 1971 4 SA 148 (T) 156A-D on the unconscionable conduct of the plaintiff in seeking to enforce a written agreement which did not correspond to the parties’ actual agreement.

³³⁶ See chs 2 (2 4 4) and 3 (3 3 2 1).

³³⁷ See ch 6 (6 4 4 3).

³³⁸ 5 3.

the document and secondly,³³⁹ the (other) elements of a claim for rectification must be proved.

In the first step, most courts adopt a form-for-form's-sake approach. It is submitted that this emphasis on *ex facie* compliance with statutory formalities is misplaced, because in addition to being theoretically suspect, the application of the rule by South African courts is anything but consistent. It is one thing to argue that the first step is required despite the fact that this may have anomalous results; it is another thing entirely when the requirement itself is counterproductive and lends itself to the drawing of tenuous distinctions.

The first step further fails to promote the functions of formalities to any greater degree than would be the case if it did not exist at all. In fact, it seems to encourage rather than prevent fraud. The potential for abuse of the protection offered by statutory formalities exists whenever it is possible for a party to rely on a defence of statutory invalidity despite the fact that the parties' underlying agreement or common intention points to validity. Common-law courts are aware of this potential for abuse and rectify agreements subject to formalities so that the legislation does not become "an instrument for enabling sharp practice".³⁴⁰ The fact that most common-law legislation prescribes unenforceability rather than nullity for a failure to comply with statutory formalities does not change the fact that the functions of formalities remain the same and that the relevant legislation in each case may be abused by unscrupulous parties. South African courts on the other hand, beyond recognising the possibility that statutory formalities may be abused,³⁴¹ seem to find themselves unable to devise a consistent solution to this problem. If the imposition of the first step described in this chapter turns out to be an obstacle, it is surely incumbent on local courts to re-examine its necessity.

In contrast to the apparent rigidity in approach to the first step in the rectification of agreements subject to formalities, South African courts appear to follow a far more flexible approach to determining whether the (additional) requirements for rectification of such

³³⁹ 5 4.

³⁴⁰ *United States of America v Motor Trucks Ltd* [1924] AC 196 200; *GMAC Commercial Credit Development Limited v Kalvinder Singh Sandhu, Kewal Singh Sandhu* [2004] EWHC 716 para 53; *Steinbach Credit Union Ltd. v Hildebrandt* 37 Man R (2d) 192 (1985) para 20. See also 5 3 4 2.

³⁴¹ See eg *Magwaza v Heenan* 1979 2 SA 1019 (A) 1029E.

agreements have been met. This is reflected in the curial relaxation of the “prior concluded contract” requirement (so that proof of a prior common intention is sufficient)³⁴² as well as the notion of what constitutes a mistake (so that even the deliberate omission of a term could qualify as one).³⁴³ The South African approach is not only more lenient than the common-law approach to these requirements, but it has also proceeded without consideration of the impact of these developments on the functions of formalities.

This is particularly evident when it comes to the mistake requirement.³⁴⁴ On the one hand, the idea that parties can deliberately omit a term from their agreement and still succeed with a claim for rectification is contrary to both the purpose of rectification and the imposition of statutory formalities. On the other, the equitable considerations underlying rectification and the awareness of the possible abuse of the writing requirement which are ignored in the first step appear to inform the courts’ approach to the deliberate omission of a term from a written agreement in the second step. It is difficult to reconcile this disregard of statutory formalities in the context of rectification, with the emphasis on the importance of such formalities in the first step. This discrepancy appears to be the result of the two-step approach itself.

By creating this artificial two-step procedure for the rectification of agreements subject to statutory formalities, South African courts have promoted an unnecessarily complicated approach to the observance of statutory formalities on the one hand and their role in rectification on the other. Arguably, a better approach would be for the courts to consider themselves faced simply with the question whether a document, irrespective of whether there is *ex facie* compliance with statutory formalities, should be rectified in order to give effect to the parties’ underlying agreement or common intention. However, in answering this question, due weight should be given both to the functions of formalities and the requirements for rectification throughout the process.

Such an approach would have the added benefit of providing an alternative solution to the problem of blank spaces in documents recording agreements subject to formalities. In the

³⁴² 5 4 2.

³⁴³ 5 4 3.

³⁴⁴ 5 4 3.

previous chapter,³⁴⁵ it was noted that the current South African approach regards an agreement subject to formalities as void if the document recording it contains blank spaces relating to material terms and the omission cannot be treated as one of the instances where extrinsic evidence is admissible. An alternative solution, and one which has already been adopted in certain common-law jurisdictions,³⁴⁶ is to consider whether the document containing such blank spaces can be rectified. If the first step were abolished, courts would be free to determine whether the parties had in fact reached agreement or shared a common intention regarding the content of that blank space, but had simply failed to complete it by virtue of a mistake.

³⁴⁵ See ch 4 (4 3 2).

³⁴⁶ G M Andrews & R Millett *The Law of Guarantees* 5 ed (2008) 88-92; *Whiting v Diver Plumbing & Heating Ltd* [1992] 1 NZLR 560 569; *Jireh Customs Limited v Clode* [2008] NZHC 1665.

CHAPTER 6: REMEDIES ARISING FROM NON-COMPLIANCE WITH STATUTORY FORMALITIES

6 1 Introduction

The previous two chapters dealt with the admission of extrinsic evidence to supplement or correct an incomplete or inaccurate recordal of the parties' agreement. What was considered there could also be seen as instances where parties attempt to convince a court that their written agreement should be enforced, either because it appears in two or more documents (incorporation by reference)¹ or because, once corrected, the document constitutes an accurate reflection of the parties' oral agreement (rectification).²

This chapter considers the situation where the agreement does not comply with formal requirements and a party is therefore unable to rely on formal completeness as the basis for enforcing a claim. In examining the various remedies which may become available to a party who has performed pursuant to such a formally defective contract, this chapter will be structured as follows: after an overview of the consequences that generally result from non-compliance with statutory formalities,³ the discussion will proceed to a comparison of the various remedies available in different jurisdictions. These in turn are divided into two categories: remedies that are aimed at providing restitution where a contract is formally defective⁴ and remedies that could lead to the enforcement of the contract, whether directly or indirectly.⁵ The chapter will conclude with a discussion of the consequences of full performance of a formally defective contract.⁶

¹ See ch 4.

² See ch 5.

³ 6 2.

⁴ 6 3.

⁵ 6 4.

⁶ 6 5.

6 2 The general consequences of non-compliance with statutory formalities: voidness, voidability and unenforceability

6 2 1 Introduction

Depending on the type of transaction involved and the legal system in which the parties find themselves, non-compliance with statutory formalities may have different consequences. The failure to comply with statutory formalities may render the agreement void. Thus, both South African and German legislation governing suretyships and sales of land prescribe nullity for failure to comply with the statutory formalities.⁷ In England, the same consequence is prescribed for non-compliance with formalities relating to the sale of land.⁸ Or a statute may simply render the agreement unenforceable, as is the case with guarantees subject to the Statute of Frauds.⁹ Finally, non-compliance with formalities may render the agreement neither void, nor unenforceable, but voidable at the instance of one or both of the parties – a result which ensues in South Africa when a seller fails to inform certain purchasers of land of their cooling-off right in writing.¹⁰ These consequences determine the nature of the remedies available to a party who has performed in terms of a formally defective agreement. For example, in South African law, remedies based on unjustified enrichment can only be used to effect restitution if an agreement is void – they are not available if an agreement is unenforceable or has been rescinded because it is voidable.¹¹ It is therefore necessary to distinguish clearly between the concepts of voidness, voidability and unenforceability.

The following discussion focuses on features of each of these concepts which explain why certain remedies become available in the event of non-compliance with a formal requirement. Furthermore, an attempt will be made to explore why non-compliance may lead to one consequence and not another. Both of these aims require that the concepts of voidness, voidability and unenforceability should be treated as if they have some fixed and

⁷ See s 2(1) of the Alienation of Land Act and s 6 of the General Law Amendment Act (South Africa); § 311b and § 766 BGB, read together with § 125 BGB (Germany).

⁸ S 2 of the Law of Property (Miscellaneous Provisions) Act.

⁹ S 4 of the Statute of Frauds.

¹⁰ S 2(2A) of the Alienation of Land Act and the discussion in 6 2 3 below.

¹¹ See eg *Crispette & Candy Co Ltd v Michaelis NO and Michaelis NO* 1948 1 SA 404 (W) 408-409; *Bisset v Boland Bank Ltd* 1991 4 SA 603 (D) 611J-612B.

universal meaning, and the discussion proceeds on the assumption that they do, at least to the extent that certain basic features of each are recognised in all legal systems. However, there can be real difficulties in distinguishing between the different consequences of non-compliance at a theoretical and practical level, both within and between legal systems,¹² and the fact that this discussion does not deal with these should be understood in the light of the scope of its aims, and not as an attempt to mask the fact that they exist.

6 2 2 Void, voidable and unenforceable

Nestadt JA made the following observations about a void or invalid¹³ contract in *Commissioner for Inland Revenue v Insolvent Estate Botha t/a 'Trio Kulture'*:¹⁴

“A void contract has been described as being 'devoid of any legal effect ... (I)t is as though no contract had been made ... It is a mere nothing ...' (Wessels' *Law of Contract in South Africa* vol 1 para 639; see too De Wet and Yeats *Kontraktereg en Handelsreg* 4th ed at 80 - 1 and Christie *The Law of Contract in South Africa* at 335.) As Innes CJ in *Schierhout v Minister of Justice* 1926 AD 99 at 109 said:

¹² The source of this difficulty is classical Roman law, which had about 30 different terms to describe the notion of “invalid”, not all of which meant the same thing. R Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 679. This lack of uniform terminology created difficulties for the commentators on the *ius commune*: in their attempts to distinguish between the concepts of voidness and voidability, for instance, they have been described as “blind men looking in a dark room for a black cat which wasn't there” (*Van der Westhuizen v Engelbrecht and Spouse and Engelbrecht v Engelbrecht* 1942 OPD 191 199 per Van den Heever J). The difficulty persists in modern law. Eg French and German law attach different meanings to the notion of “relative invalidity” (Zimmermann *Law of Obligations* 679 n 7). In South African law, C C Turpin “Void and Voidable Acts” (1955) 72 *SALJ* 58 distinguishes between void and voidable acts (but has no difficulty in grouping both concepts under the term “invalid” (61)); A M Honoré “Degrees of Invalidity” (1958) 75 *SALJ* 32 identifies nine different types of invalidity (which include void, voidable and “inchoate” transactions); and a recent attempt to provide plain language drafting tips for contracts drafted in terms of the Consumer Protection Act 68 of 2008 suggests that the phrase “null, void and no force and effect whatsoever” should be replaced with alternatives like void, invalid or unenforceable, which implies that these concepts are interchangeable (see E de Stadler & R Baitsewe “Plain Language Tips” (February 2012) *Consumer Law Review* <<http://www.jutalaw.co.za/newsletter/newsletter/consumer-law-review-january-2012-1/>> (accessed 05-11-2012)).

¹³ The concept of invalidity is used in the narrow sense of voidness and not as a general category denoting several different types of consequences (see n 12).

¹⁴ 1990 2 SA 548 (A).

'It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. The rule is thus stated: "*Ea quae lege fieri prohibentur, si fuerint facta, non solum inutilia, sed pro infectis habeantur; licet legislator fieri prohibuerit tantum, nec specialiter dixerit inutile esse debere quod factum est.*" (Code 1.14.5.) So that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done - and that whether the lawgiver has expressly so decreed or not[,] the mere prohibition operates to nullify the act.'"¹⁵

It follows that when an agreement is void, contractual remedies are not available to a party who has performed pursuant to such an agreement. However, while the general point of departure is that the invalid contract may not be enforced,¹⁶ an enrichment remedy will often be available to such a party in order to reclaim his performance.¹⁷

An enrichment remedy is not automatically available where a contract is unenforceable. This is because unenforceable contracts are valid, but may not be sued upon.¹⁸ Therefore, the effect of unenforceability

"is not to render the [contract] ... void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract".¹⁹

The fact that an unenforceable contract is nonetheless valid leaves open the possibility that remedies could be fashioned which may lead, directly or indirectly, to its ultimate enforcement. For example, common-law jurisdictions have developed the doctrine of part performance in the context of certain agreements which are unenforceable for failure to comply with the formal requirements prescribed by the Statute of Frauds or its common-law counterparts. As discussed in greater detail below,²⁰ a successful reliance on this doctrine results in an award of specific performance (or damages in lieu thereof).

¹⁵ 565D-F.

¹⁶ There are exceptions to this general rule: see 6 4 below.

¹⁷ See 6 3 3 below.

¹⁸ See eg S J Whittaker "Form" in H G Beale (gen ed) *Chitty on Contracts 1: General Principles* 30 ed (2008) 379 398.

¹⁹ *Maddison v Alderson* (1883) 8 App Cas 467 488.

²⁰ 6 4 2.

Unenforceability should not be confused with voidability.²¹ A contract which is voidable affords one or both of the parties the power to rescind the contract. Until the right of rescission is exercised, the contract is both valid and enforceable.²² Once the contract is rescinded, it is retrospectively declared null and void *ab initio*.²³ Since any performance made pursuant to a voidable contract before it is rescinded occurs in terms of a valid contract,²⁴ the remedy used to reclaim one's performance and which becomes available as a result of rescission, namely *restitutio in integrum*, is said to be contractual in nature.²⁵

While it is possible that non-compliance with a particular formal requirement could result in voidness, unenforceability or voidability, a discussion of the basic implications of these concepts does not explain why non-compliance should lead to one result and not another. The following section attempts such an explanation.

6 2 3 "Balance of interests" analysis and the consequences of non-compliance with formal requirements

In the absence of a general principle to explain them, the different consequences visited upon non-compliance with formal requirements appear to be imposed somewhat arbitrarily. For example, it is not immediately apparent why non-compliance with section 2(1) of the Alienation of Land Act, which provides that an alienation of land "shall ... [not]

²¹ See eg A T Von Mehren "Formal Requirements" in A T von Mehren (ed) *Int Enc Comp L VII* (1998) 1 117 n 859, 124 who equates unenforceability with voidability.

²² S W J van der Merwe, L F van Huyssteen, M F B Reinecke & G F Lubbe *Contract: General Principles* 4 ed (2012) 116.

²³ *Bonne Fortune Beleggings v Kalahari Salt Works (Pty) Ltd* 1973 3 SA 739 (NC) 743H; *Davidson v Bonafede* 1981 2 SA 501 (C) 510A; *Maseko v Maseko* 1992 3 SA 190 (W) 199E-F; *Laco Parts (Pty) Ltd t/a ACA Clutch v Turners Shipping (Pty) Ltd* 2008 1 SA 279 (W) para 16.

²⁴ By contrast, enrichment remedies become available if there is no legal ground at the time of performance – see J du Plessis *The South African Law of Unjustified Enrichment* (2012) 69, 106.

²⁵ W de Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 3 ed (1987) 158-159; Van der Merwe et al *Contract* 116; Du Plessis *Law of Unjustified Enrichment* 68 ff; *Laco Parts (Pty) Ltd t/a ACA Clutch v Turners Shipping (Pty) Ltd* 2008 1 SA 279 (W) paras 16, 18. However, see eg D Visser "Rethinking Unjustified Enrichment: A Perspective of the Competition Between Contractual and Enrichment Remedies" 1992 *Acta Juridica* 203 211 ff; *Unjustified Enrichment* (2008) 108-112; P H O'Brien "*Restitutio In Integrum* by Onbehoorlik Verkreeë Wilsooreenstemming" 1999 *TSAR* 203 211 ff who argue that this view of *restitutio in integrum* is not the only, or even the best, way to classify the remedy.

be of any force or effect” if it is not in writing, should result in invalidity,²⁶ while non-compliance with section 2(2A) of the same Act, which provides that a purchaser’s cooling-off right “shall” be contained in a deed of alienation, merely results in voidability.²⁷ It appears that this problem is not unique to the sphere of statutory formalities. Also in the context of legality, one finds that illegal restraints of trade and certain types of illegal wagers are regarded as unenforceable rather than void, in spite of the fact that legality is a constitutive requirement for a valid contract.²⁸ The criterion for drawing this distinction is not apparent in case law:

“The courts have certainly had occasion to express themselves on the reason for regarding some illegal contracts as unenforceable but not void *ab initio*. Nevertheless, they have not done so, at least not to the extent that they have identified a single measure for distinguishing between invalidity and unenforceability.”²⁹

It has been suggested elsewhere³⁰ that the distinction is based on a balancing of individual against social or public interests (social or public interests should be distinguished from the more abstract concept of public policy, which provides the means to determine the relative weight to be afforded to various interests³¹). Where an agreement is, first and foremost, contrary to social interests, the tendency is to declare such an agreement void.³² Where the agreement primarily affects individual interests, and social interests only at a secondary level, then non-compliance with the requirement of legality will result in a lesser consequence like unenforceability or voidability.³³

²⁶ The definitive case on the meaning of this phrase in the context of sales of land is *Wilken v Kohler* 1913 AD 135, discussed further in the main text.

²⁷ See *Gowar Investments (Pty) Ltd v Section 3 Dolphin Coast Medical Centre* CC 2007 3 SA 100 (SCA), discussed further in the main text.

²⁸ Van der Merwe et al *Contract* 173-174. A discussion of unenforceable wagers, and restraints of trade, can be found in T Floyd “Legality” in D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 2 ed (2012) 175 193-200; Van der Merwe et al *Contract* 182-188.

²⁹ Van der Merwe et al *Contract* 174.

³⁰ S van der Merwe & L F van Huyssteen “The Force of Agreements: Valid, Void, Voidable, Unenforceable” (1995) 58 *THRHR* 549; Van der Merwe et al *Contract* 175-176.

³¹ Van der Merwe & Van Huyssteen 1995 *THRHR* 560-561.

³² 562.

³³ 562.

Although it has not enjoyed particular prominence in the South African context, a “balance of interests” analysis may also be used to explain why non-compliance with certain formal requirements results in invalidity, while in other cases the contract is merely voidable. For example, in *Wilken v Kohler*³⁴ (“*Wilken*”) the court was required to determine the legislative intention behind section 49 of the Free State Ordinance No 12 of 1906, which provided that an oral agreement for the sale of land would not be of “any force and effect”. According to Innes J, the purpose of such legislation was not to protect a particular class of persons, but to promote broader social aims:

“Buyers and sellers of land form no class by themselves; nor do they suffer from any disability or weakness requiring protection. The object of the Legislature could not have been specially to favour so indeterminate a body. The idea, no doubt, was the same which underlay the English Statute of Frauds. Recognising that contracts for the sale of fixed property were, as a rule, transactions of considerable value and importance, and that the conditions attached were often intricate, the Legislature, in order to prevent litigation and to remove a temptation to perjury and fraud, insisted upon their being reduced to writing ... I am satisfied that the provision was adopted not for the advantage of any particular class of persons, but on grounds of public policy. So that the section should be read not as making these ...[oral] contracts voidable at the option of either of the parties, but as rendering them entirely void.”³⁵

Thus, a formal requirement which aims primarily at the prevention of fraud, unnecessary litigation and perjury is in the public interest, at least in South African law. The formal requirements prescribed for suretyships have the same aim, and are also in the public interest.³⁶ According to Innes J, this necessitates a conclusion that non-compliance with the formal requirements should result in invalidity.

This “balance of interests” analysis can also be used to explain the imposition of invalidity for non-compliance with the formal requirements imposed for sales of land and suretyships in German law. However the emphasis there is less on the overarching fraud-prevention purpose of form, and more on the specific functions served by formal requirements. In

³⁴ 1913 AD 135.

³⁵ 142. A similar sentiment is expressed in the majority judgment of Solomon J (149). Presumably the concept of “public policy” as it is used by Innes J in this quotation should be understood as denoting broader social or public interests, in contrast to the narrower concept of individual interests.

³⁶ See eg *Fourlamel (Pty) Ltd v Maddison* 1977 1 SA 333 (A) 343A; *Oceanair (Natal) (Pty) Ltd v Sher* 1980 1 SA 317 (D) 326B; *Intercontinental Exports (Pty) Ltd v Fowles* [1999] 2 All SA 304 (A) para 9.

particular, the relevant formal requirements are imposed to prevent hasty decisions, the danger of which is emphasised in transactions relating to both land and suretyships.³⁷ Furthermore, the formal requirement should serve to warn parties that they are moving from negotiation to contract conclusion.³⁸ However, no distinction is drawn, for the purposes of this caution, between sellers and buyers, or sureties (provided the latter do not fall within the merchant exception in paragraph 350 HGB³⁹). The consequence of invalidity for non-compliance with the relevant formal requirements is therefore in line with the notion that they serve the public interest and are not merely imposed to protect individual interests.⁴⁰

By contrast, when a particular formal requirement serves more individualised interests, the result of non-compliance should, according to the “balance of interests” analysis, result in voidability. It seems that this is indeed the case, as is evident in the decision in *Gowar Investments (Pty) Ltd v Section 3 Dolphin Coast Medical Centre CC*⁴¹ (“*Gowar Investments*”) which focuses on the failure to record a purchaser’s cooling-off right in a deed of alienation.

The Alienation of Land Act was amended in 1998⁴² by insertion of section 29A, which stipulates that certain purchasers of land have the right to revoke an offer to purchase the land, or to terminate a deed of alienation, within a period of five days after signature of the offer or the deed of alienation. This cooling-off right is only available to a specific group of purchasers.⁴³ The amending Act further inserted section 2(2A) which provides that “the

³⁷ B Markesinis, H Unberath & A Johnston *The German Law of Contract: A Comparative Treatise* 2 ed (2006) 84.

³⁸ Markesinis et al *German Law of Contract* 84; R Kanzleiter “§ 311b” in W Krüger (ed) *Münchener Kommentar zum Bürgerlichen Gesetzbuch 2 Allgemeiner Teil: §§ 241-432* 5 ed (2007) n 1; M Habersack “§ 766” in M Habersack (ed) *Münchener Kommentar zum Bürgerlichen Gesetzbuch 5 Besonderer Teil III: §§ 705-853* 5 ed (2009) n 1.

³⁹ See ch 2 (2 3 4).

⁴⁰ D Einsele “§ 125” in F J Säcker (ed) *Münchener Kommentar zum Bürgerlichen Gesetzbuch 1 Allgemeiner Teil: §§ 1-240* 6 ed (2012) n 56.

⁴¹ 2007 3 SA 100 (SCA).

⁴² By virtue of the Alienation of Land Amendment Act 103 of 1998.

⁴³ S 29(A)(5). They are purchasers (a) of property not exceeding R250 000; (b) who are purchasing: (i) land used or intended to be used for residential purposes; (ii) an interest as defined in the Housing Development Schemes for Retired Persons Act 65 of 1988; (iii) a share in a share-block company which confers the right

deed of alienation shall contain the right of a purchaser or prospective purchaser to revoke the offer or terminate the deed of alienation". However, the consequence of non-compliance with this provision was not indicated, and it was only in *Gowar Investments* that the uncertainty created by the conflicting decisions in *Section 3 Dolphin Coast Medical Centre CC v Cowar* [sic] *Investments (Pty) Ltd*⁴⁴ (failure to include the cooling-off right renders the deed of alienation voidable) and *Sayers v Kahn*⁴⁵ (failure to include the cooling-off right invalidates the deed of alienation) was settled.

In *Gowar Investments*, the court held that section 29A "is a typical piece of consumer-protection legislation which is aimed at protecting the vulnerable, uninformed small buyer of residential property".⁴⁶ It is therefore arguable that this section does not aim to promote the broader social interests associated with section 2(1) of the Alienation of Land Act (the eventual successor of provisions like section 49 of the Free State Ordinance No 12 of 1906 considered by Innes J), but is aimed at protecting only certain purchasers.⁴⁷ This limited protective purpose also triggers section 2(2A): its function is to bring the right created by section 29A to the attention of the purchaser only.⁴⁸ It was not intended that the seller should also have notice of this right: section 2(2A) merely requires "a deed of alienation" to contain this reference and not also the offer made by the purchaser.⁴⁹ Due to the limited protective purpose of sections 29(A) and 2(2A), and the fact that the consequence of invalidity could not be inferred from the wording of the latter provision,⁵⁰

to occupy land used mainly for residential purposes; (iv) a sectional-title unit; and (c) who are natural persons (trusts, companies, close corporations and the like are excluded).

⁴⁴ 2006 2 SA 15 (D) para 19.

⁴⁵ 2002 5 SA 688 (C) 694C-E.

⁴⁶ *Gowar Investments (Pty) Ltd v Section 3 Dolphin Coast Medical Centre CC* 2007 3 SA 100 (SCA) para 11. The legislature apparently erred in making the cooling-off right available to all purchasers of sectional title units, rather than to purchasers of residential units only (see para 9).

⁴⁷ *Gowar Investments (Pty) Ltd v Section 3 Dolphin Coast Medical Centre CC* 2007 3 SA 100 (SCA) para 6 (iii). See also *3 Dolphin Coast Medical Centre CC v Cowar Investments (Pty) Ltd* 2006 2 SA 15 (D) paras 18-19.

⁴⁸ *Gowar Investments (Pty) Ltd v Section 3 Dolphin Coast Medical Centre CC* 2007 3 SA 100 (SCA) para 11. This was also the finding of the court *a quo*: *3 Dolphin Coast Medical Centre CC v Cowar Investments (Pty) Ltd* 2006 2 SA 15 (D) para 17.

⁴⁹ *Gowar Investments (Pty) Ltd v Section 3 Dolphin Coast Medical Centre CC* 2007 3 SA 100 (SCA) para 13.

⁵⁰ Para 12. S 2(1) of the Act, which does prescribe invalidity, commences with the words "[n]o deed of alienation ... shall ... be of any force or effect".

the court held that a deed of alienation which does not specify the cooling-off right of the purchaser is voidable at the instance of that purchaser, rather than void.

One statute which does not appear to lend itself to this “balance of interests” analysis is the Statute of Frauds. In its original form, the Statute prescribed unenforceability for both formally defective guarantees and alienations of land. However, it will be recalled that the preamble to the Statute states that it was enacted “[f]or prevention of many fraudulent [p]ractices which are commonly endeavoured to be upheld by [p]erjury and [s]ubornation of [p]erjury.” These concerns underlying the prescribed formal requirements were the same concerns which have led South African courts to conclude that the formal requirements imposed for sales of land and suretyships were in the public interest and that non-compliance should therefore result in invalidity.⁵¹ This discrepancy may be explained in one of two ways.

On the one hand, it could be argued that a formal requirement which is intended to reduce fraud and perjury merely addresses evidentiary concerns and as such, is not in the broader public interest. There is some academic support for this suggestion,⁵² and it may be that South African courts have attached greater importance to the fraud-prevention purpose of form than is justified, by imposing a consequence of invalidity rather than unenforceability for non-compliance.⁵³ On the other hand, this argument presupposes that the reduction of fraud, perjury and unnecessary litigation must be equated with the evidentiary function of a formal requirement. In a previous chapter it was argued that the overarching purpose of the formal requirements under discussion here is the reduction of fraud and related problems,⁵⁴ and that this purpose is achieved, *inter alia*, by the evidentiary function of formalities.

⁵¹ See also ch 2 (2 2) for a discussion of the historical conditions leading to the promulgation of the Statute.

⁵² K Zweigert & H Kötz *An Introduction to Comparative Law* (tr T Weir) 3 ed (1998) 366-367, 371; I England “Restitution of Benefits Conferred without Obligation” in E Von Caemmerer & P Schlechtriem (eds) *Int Enc Comp L X7* ed (2007) 1 55.

⁵³ It is entirely possible that legal systems may reach different conclusions on which interests are affected by a legal phenomenon. Eg SA regards improperly-obtained consent as primarily affecting individual interests, which leads to the conclusion that a contract concluded in these circumstances is voidable. Other legal systems regard this legal phenomenon as affecting broader social interests – see Van der Merwe & Van Huyssteen 1995 *THRHR* 565-567.

⁵⁴ See ch 2 (2 3 3).

If this analysis is correct, it explains the contradiction between the South African approach and the conclusions drawn by some academic commentators. However, it does not explain the different consequences imposed for non-compliance with formal requirements which fulfil the same purpose, like section 2(1) of the Alienation of Land Act and the Statute of Frauds.

It appears that the better explanation for this discrepancy is rather mundane. Until the middle of the nineteenth century, English courts treated all formally defective contracts within the scope of the Statute of Frauds as void, rather than unenforceable.⁵⁵ It was only in *Leroux v Brown*⁵⁶ that the consequence of unenforceability was distinguished from that of invalidity. Furthermore, the reason for the court's conclusion was based solely on the fact that the provisions of the Statute of Frauds relating to different types of contracts were worded differently.⁵⁷ Section 4 of the Statute provided that "no action shall be brought" on a guarantee or sale of land, for example, unless that agreement had been reduced to writing. By contrast, section 17 of the Statute, which related to the sale of goods for £10 or more, provided that "no contract shall be allowed to be good" unless it complied with the writing requirement. This difference in the wording of the sections led the court to conclude that non-compliance with section 17 meant that the contract was void, while non-compliance with section 4 simply meant that the contract could not be sued upon. At no point in the judgment is there any indication that the court's conclusion was motivated by the opinion that section 4 was any less in the public interest than section 17. The court also appeared to lose sight of the fact that the difference in the formulation of the two sections was probably due to the fact that they were drafted by different authors, and not because the intention was to prescribe different results for non-compliance with the different sections.⁵⁸

Whatever the motivation for the provision of unenforceability rather than invalidity in section 4 of the Statute of Frauds, the Law of Property (Miscellaneous Provisions) Act now

⁵⁵ A W B Simpson *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (1975) 609, 612.

⁵⁶ 138 ER 1119 (1852).

⁵⁷ 1129 per Jervis CJ; 1130 per Maule J.

⁵⁸ Simpson *Common Law of Contract* 612.

provides that a sale of land must be in writing in order to be valid.⁵⁹ The reason for this change appears to be partly practical and partly policy-driven. First, the English Law Commission suggested that the concept of unenforceability was too confusing:

“The distinction ... made between valid but unenforceable contracts, on the one hand, and invalid contracts, on the other hand, is probably not well understood. Where the parties have acted in ignorance of the legal formalities it is probably preferable for any contract to be void, rather than for there to be a contract which is valid but enforceable by some means and not others and possibly enforceable against one party but not against the other.”⁶⁰

Secondly, the Law Commission felt that a consequence of invalidity would promote greater certainty and therefore reduce the possibility of fraud.⁶¹ In *Yaxley v Gotts*,⁶² it was noted that

“[the] requirement that any contract for the disposition of an interest in land must be made in a particular documentary form, and will otherwise be void, ... can be seen as embodying [the] conclusion, in the general public interest, that the need for certainty as to the formation of contracts of this type must in general outweigh the disappointment of those who make informal bargains in ignorance of the statutory requirement.”⁶³

6 2 4 Conclusion

This discussion has attempted to provide a means to determine why non-compliance with formal requirements can lead to different consequences. According to a “balance of interests” analysis, the fact that some formal requirements serve broader social interests is emphasised by a consequence of voidness in the event of non-compliance; a lesser consequence is imposed when a formal requirement serves more individualised interests. This is not to say that this relationship is always self-evident: the Statute of Frauds, for

⁵⁹ It should be pointed out that a similar consequence was suggested, albeit unsuccessfully, for formally defective guarantees – see English Law Revision Committee “Sixth Interim Report: The Statute of Frauds and the Doctrine of Consideration” (1937) XV *Can Bar Rev* 585 617. The justification for the suggested change was that voidness emphasised the general fraud-prevention purpose of the formal requirements imposed for guarantees.

⁶⁰ *Formalities for Contracts for Sale etc of Land (Working Paper No 92)* (1985) para 5.7

⁶¹ Para 5.6.

⁶² [2000] Ch 162.

⁶³ 175.

example, prescribes unenforceability for non-compliance with its requirements, and yet it primarily serves a purpose which is in the public interest. Nevertheless, a “balance of interests” analysis provides a satisfactory explanation for the different consequences imposed by modern legislation prescribing formal requirements, and it is arguable that the discrepancy between the purpose of the Statute of Frauds and the consequence of unenforceability should be viewed in light of the historical concerns which led to its promulgation.

Since this “balance of interests” analysis has further revealed that different legislators are motivated by the same or similar concerns when imposing formal requirements, at least in the case of invalidity, one would expect that the approach to the remedies available to a party who has performed in terms of such an agreement would be the same across all legal systems. This expectation will be disappointed: some award remedies which could lead to the (indirect) enforcement of the contract, in spite of the fact that it is formally invalid because the formal requirement was in the public interest.⁶⁴ However, common to all the legal systems referred to, is the availability of an enrichment remedy to a party who has performed in terms of a formally defective agreement. This, and other remedies which do not enforce such an agreement, will serve as the topic of the next section.

6 3 Remedies aimed at restitution of performances made in purported fulfilment of formally defective contracts

6 3 1 Introduction

This section focuses primarily on remedies which arise from the invalidity or unenforceability of a formally defective agreement.⁶⁵ Where a party has performed in terms of an alienation of land which is void for non-compliance with section 2(1) of the Act, South African law offers two possible remedies: the *rei vindicatio* where ownership has not

⁶⁴ See 6 4 below.

⁶⁵ In passing, it should be noted that that in South African law, the failure to record the cooling-off right in a deed of alienation (which renders the agreement voidable) also results in a remedy for a purchaser or prospective purchaser. Section 29A(4) of the Alienation of Land Act provides that where such a party has elected to rescind the contract, every person who has received money from him must refund it.

been transferred, and enrichment remedies where it has.⁶⁶ In the case of suretyship agreements, only an enrichment action is available to a party who has performed pursuant to a formally invalid agreement.⁶⁷ These remedies will now be considered.

6 3 2 The *rei vindicatio*

The general point of departure is that the owner of property may use the *rei vindicatio* to reclaim that property from any person who possesses it without his consent.⁶⁸ The justification for the existence of the remedy is given by Jansen JA in *Chetty v Naidoo*.⁶⁹

“[O]ne of [the] incidents [of *dominium*] is the right of exclusive possession of the *res*, with the necessary corollary that the owner may claim his property wherever found, from whomsoever holding it [with the *rei vindicatio*]. It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner”.⁷⁰

The availability of the *rei vindicatio* presupposes that ownership has not been transferred to the other party, which in turn depends on whether the requirements for the passing of ownership have been met.⁷¹

The two “active elements”⁷² for the passing of ownership are delivery (which is effected by registration in the case of immovable property) and an intention to give and receive ownership (the real agreement). It has also been said that an effective transfer of ownership may require a *iusta causa traditionis*⁷³ – what exactly constitutes a *iusta causa*

⁶⁶ *Akbar v Patel* 1974 3 All SA 348 (T); *Patel v Adam* 1977 2 SA 653 (A); *Legator McKenna Inc v Shea* 2010 1 SA 35 (SCA).

⁶⁷ The reason why a surety will generally not have *rei vindicatio* to reclaim his performance is discussed in 6 3 2 below.

⁶⁸ *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 2 SA 986 (T) 995I-996C (reversed in part on appeal in *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 2003 1 SA 204 (T), but not on this point); C G van der Merwe *Sakereg* 2 ed (1989) 347-353; P J Badenhorst, J M Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (2006) 242.

⁶⁹ 1974 3 SA 13 (A).

⁷⁰ 20B-C.

⁷¹ A discussion of these requirements can be found in Van der Merwe *Sakereg* 301-305.

⁷² D L Carey-Miller *The Acquisition and Protection of Ownership* (1986) 121.

⁷³ Van der Merwe *Sakereg* 304.

and the extent to which it is relevant for an effective transfer of ownership depends on whether a legal system has adopted a causal or abstract system of transfer.

In a causal system of ownership, the transfer of a real right is made dependent on the validity of the legal ground which is the reason for the transfer⁷⁴ (usually, this legal ground takes the form of an obligation-creating agreement,⁷⁵ and for current purposes it is assumed that the legal ground is such an agreement). The requirement of a *iusta causa* in a causal system therefore means that there must be a valid underlying agreement before ownership will pass.⁷⁶ In an abstract system, there is no causal relationship between the obligation-creating agreement and the real agreement. The validity or invalidity of the former usually has no impact on the latter: provided the real agreement is valid, ownership will be transferred.⁷⁷ Thus, a reference to a *iusta causa* in an abstract system is not a reference to a valid obligation-creating agreement, but is either a reference to the real agreement itself⁷⁸ or a reference to the circumstances from which the real agreement is inferred.⁷⁹

The application of the abstract system of transfer of ownership in the context of movables has been settled law in South Africa for some time.⁸⁰ However, the question of which system of transfer of ownership applies to immovable property was conclusively decided by the Supreme Court of Appeal only in the recent case of *Legator McKenna Inc v Shea*⁸¹ ("*Legator*"). There, the second appellant, acting in his capacity as *curator bonis* for the first respondent (who had suffered brain injuries), purported to sell Shea's house to the second

⁷⁴ 305.

⁷⁵ 305.

⁷⁶ 305-306.

⁷⁷ Van der Merwe *Sakereg* 306. In German law, the distinction between the obligation-creating agreement and the agreement which transfers the right of ownership is referred to as the *Trennungsprinzip* ("principle of separation"), while the notion that the validity of the second agreement is independent of that of the first agreement is known as the *Abstraktionsprinzip* ("principle of abstraction"). See Markesinis et al *German Law of Contract* 27 ff.

⁷⁸ Van der Merwe *Sakereg* 310.

⁷⁹ Badenhorst et al *The Law of Property* 77; *MCC Bazaar v Harris and Jones (Pty) Ltd* 1954 3 SA 158 (T) 161F.

⁸⁰ *Commissioner of Customs & Excise v Randles, Brothers & Hudson Ltd* 1941 AD 369; *Trust Bank van Afrika Bpk v Western Bank Bpk & Andere NNO* 1978 4 SA 281 (A); *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein* 1980 3 SA 917 (A).

⁸¹ 2010 1 SA 35 (SCA).

respondents, the Erskines. The house was transferred to the couple. Shea recovered from her injuries and claimed the return of her house against repayment of the purchase price on the ground that the sale agreement was void.

The Erskines had presented the second appellant with a written offer to buy Shea's house which he duly signed, but with the addition of the words "subject to approval of Master of High Court"⁸² next to his signature.⁸³ According to Brand JA, the conditional acceptance of the Erskines' offer amounted to a counter-offer which was never accepted in writing by the Erskines.⁸⁴ As a result, no valid agreement of sale was concluded between the parties because, *inter alia*, their agreement did not comply with the formalities prescribed by section 2(1) of the Alienation of Land Act.⁸⁵

The availability of the *rei vindicatio* on these facts depended on whether an abstract or causal system of transfer of ownership applied to immovable property in South African law. In this regard Brand JA confirmed that previous High Court decisions, which had held that the abstract system of transfer of ownership was applicable to immovable property, were correct.⁸⁶ Therefore, provided there is registration (delivery) and a valid real agreement, ownership will pass to the buyer irrespective of whether the underlying agreement is valid or invalid. Only if the real agreement is (also) invalid, will ownership fail to pass⁸⁷ and will the *rei vindicatio* be the appropriate remedy to reclaim the property.

This decision resolves the question of which system of transfer of ownership is applicable to immovables in South African law.⁸⁸ However, there is no reference to the fact that the choice to adopt an abstract, rather than causal, system has important implications for both the original contracting parties and their subsequent successors-in-title, depending on

⁸² Para 7.

⁸³ In terms of the court order appointing the second appellant as *curator bonis*, the consent of the Master to the transaction was required (para 16).

⁸⁴ Para 17.

⁸⁵ Para 18.

⁸⁶ *Legator McKenna Inc v Shea* 2010 1 SA 35 (SCA) para 21. The cases that the court refers to are *Brits v Eaton NO* 1984 4 SA 728 (T); *Klerck NO v Van Zyl and Maritz NNO* 1989 4 SA 263 (SE); *Kriel v Terblanche NO* 2002 6 SA 132 (NC).

⁸⁷ *Legator McKenna Inc v Shea* 2010 1 SA 35 (SCA) para 22.

⁸⁸ The decision was subsequently confirmed in *Du Plessis v Propitius* 2010 1 SA 49 (SCA) para 10; *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC* 2011 2 SA 508 (SCA) paras 12, 26.

which alternative is chosen. Where the validity of the legal basis (a *iusta causa* in the true sense) plays a decisive role in determining whether ownership is transferred, as it does in a causal system, the interests of the owner are afforded greater protection than those of the transferee or his successors-in-title. When the *causa* is void, the owner is always entitled to reclaim the property from the transferee with the *rei vindicatio*, and even from a *bona fide* third party to whom the property is subsequently transferred.⁸⁹ In an abstract system, greater protection is given to the transferee and his successors-in-title, because all that is required for the passing of ownership is a valid real agreement and registration. On the one hand, the relative lack of importance of the underlying obligation-creating agreement mitigates the potentially harsh consequences which may arise in a legal system with a negative system of registration as is the case in South Africa,⁹⁰ and promotes the certainty of commercial transactions.⁹¹ On the other, favouring an abstract system of transfer means that the owner of property loses his right to reclaim that property with the *rei vindicatio* if the real agreement is valid. In these circumstances, he is limited to an enrichment claim which affords him a personal right only, with the effect that he is treated simply as a concurrent creditor if the transferee becomes insolvent.⁹²

It is therefore important in an abstract system to determine when the real agreement (which is required for the transfer of both moveable and immoveable property) will be invalid, in which case the transferor retains the *rei vindicatio*, and when it will be valid, so that the transferor may only resort to an enrichment remedy. In particular, and for the purposes of this discussion, it becomes important to determine whether the formal invalidity of the underlying agreement also affects the validity of the real agreement.⁹³

⁸⁹ Badenhorst et al *The Law of Property* 75; Carey-Miller *Ownership* 124; *Kriel v Terblanche* NO 2002 6 SA 132 (NC) para 23.

⁹⁰ Van der Merwe *Sakereg* 310; *Kriel v Terblanche* NO 2002 6 SA 132 (NC) para 35. A negative system of registration means that there is no assurance that the information contained in the register is correct. It protects the true owner at the expense of a *bona fide* third party, who can become the victim of a faulty record (Van der Merwe *Sakereg* 342 ff; *Meintjies NO v Coetzer* 2010 5 SA 186 (SCA) para 9).

⁹¹ Van der Merwe *Sakereg* 311; Badenhorst et al *The Law of Property* 79. See also *Kriel v Terblanche* NO 2002 6 SA 132 (NC) para 37.

⁹² Badenhorst et al *The Law of Property* 79.

⁹³ 79-80.

This question was also discussed in *Legator*. According to Brand JA, a mistake about the formal validity of the underlying agreement does not render the real agreement invalid. The judge comes to this conclusion for two reasons. First, if a mistake regarding the formal validity of the underlying obligation-creating agreement were to prevent the passing of ownership, then this would amount to adopting a causal system of ownership, because the reason for the transfer would be decisive in determining whether ownership had passed or not.⁹⁴

Secondly, and related to the first point: if the underlying obligation-creating agreement is simply regarded as the reason for the transfer, then it follows that any mistake made about that reason constitutes a mistake in motive. As pointed out by Brand JA, “a mistaken assumption about the validity of the underlying *causa* constitutes a mistake in motive”⁹⁵ and does not, as a general rule, invalidate the real agreement. For these reasons, Shea was not entitled to reclaim the property using the *rei vindicatio* because ownership had been transferred to the Erskines, in spite of the fact that the underlying sale agreement was formally invalid.

While this reasoning is persuasive, it is notable that Brand JA did not consider whether the legislature intended that the prescribed formal requirements should prohibit both an underlying obligation-creating agreement which did not comply with them and, by implication, the transfer of ownership pursuant to such an agreement.⁹⁶ Nevertheless, while Brand JA paid no attention to this question in the context of the Alienation of Land Act, it was addressed in one of the High Court decisions referred to by the judge as support for the conclusion that an abstract system applies in South African law.

In *Kriel v Terblanche NO*,⁹⁷ Buys J stated:

⁹⁴ *Legator McKenna Inc v Shea* 2010 1 SA 35 (SCA) para 23.

⁹⁵ Para 24.

⁹⁶ Badenhorst et al *The Law of Property* 80 state that if an agreement is subject to formal requirements, “it is necessary to inquire whether the achievement of the object itself is prohibited in the event of non-compliance with the said formalities” in order to determine whether the real agreement will be invalid. Van der Merwe *Sakereg* 313-314 makes the same suggestion.

⁹⁷ 2002 6 SA 132 (NC).

“[Art 28(2) van die Wet op Vervreemding van Grond] is die artikel wat bepaal dat enige vervreemding van grond wat nie aan die bepalings van art 2(1) voldoen nie, in alle opsigte van die begin af geldig sal wees indien die koper en die verkoper ten volle presteer. ‘n Koopkontrak van grond wat dus nietig is weens nie-nakoming van die vereistes vir ‘n geldige koopkontrak gestel in art 2(1) van die bepaalde Wet word deur art 28(2) gewettig, presies soos die geval ook sal wees by ‘n abstrakte stelsel van eiendomsoorgang ... [A]rt 28(2) sanksioneer ‘n abstrakte stelsel van eiendomsoorgang by onroerende goed.”⁹⁸

At the outset, it should be pointed out that unlike section 28(2), an abstract system of ownership does not “wettig” (legitimise) an invalid obligation-creating agreement - it operates on the assumption that the invalidity of that agreement does not affect the validity of the real agreement. However, section 28(2) does indicate that the purpose of a sale of land is not prohibited: full performance of a formally invalid alienation will still result in a transfer of ownership. In other words, the Alienation of Land Act prescribes formal requirements for sales of land as the means to achieve a certain end, but it does not prohibit that end or purpose of the sale of land itself from being achieved.⁹⁹ It is in this sense that section 28(2) “sanctions” an abstract system of transfer of ownership because it allows for the transfer.

In the above discussion, we have seen that the abstract system of transfer of ownership applies to both movable and immovable property. This means that the *rei vindicatio* will only be applicable in the context of a formally defective sale agreement if the real agreement itself is (also) void, thus preventing the passing of ownership. However, a mistake regarding the formal validity of the contract of sale will not vitiate the real agreement. In such event, ownership will be transferred and the only possible remedy available to the party who has performed would be based on unjustified enrichment.¹⁰⁰

Before concluding this section, a few words are required on the *rei vindicatio* and transfers of money, which constitutes performance on the part of the purchaser of land and usually also of the surety.¹⁰¹ Where such a party has paid a sum of money in terms of a formally

⁹⁸ Para 48.

⁹⁹ This point is also relevant when determining the effect of full performance on a formally defective agreement (see 6 5 below).

¹⁰⁰ A claim of this nature was also found not to be available to Shea. See 6 5 below.

¹⁰¹ See, in general, Du Plessis *Law of Unjustified Enrichment* 34-36; 236-238.

invalid agreement, he will generally not be able to use the *rei vindicatio* to reclaim that sum. This is due to the fact that the transferred funds are often mixed with the recipient's funds, with the result that the latter becomes owner through original acquisition of ownership.¹⁰² In any event, it has been stated that

“[m]ost money is ... not real in any ‘physical’ sense, but ‘owned’ in the form of personal rights or claims against others.”¹⁰³

These personal claims include enrichment claims, which is the topic of the next section.

6 3 3 Remedies based on unjustified enrichment

6 3 3 1 Introduction

The law of unjustified enrichment plays a greater role in an abstract system of transfer of ownership than in a causal system:

“[‘n] [*Iusta causa* kan aanwesig wees selfs waar daar geen geldige verbintenisregtelike verhouding tussen die partye bestaan nie. Derhalwe kan eiendomsreg oorgaan sonder dat die ontvanger verbintenisregtelik aanspraak kan maak op die vermoënsverskuiwing, in welke geval die vermoënsverskuiwing *sine causa* was.”¹⁰⁴

It follows that

¹⁰² Du Plessis *Law of Unjustified Enrichment* 236; *First National Bank of Southern Africa Ltd v Perry NO* 2001 3 SA 960 (SCA) para 16. However, there are situations in which a bank may reverse a transfer or withhold payment of the funds to the account holder (see Du Plessis *Law of Unjustified Enrichment* 34-36 for examples and relevant case law). In the latter situation, the payer has a right to reclaim those funds and this has been described as a “quasi vindicatory” claim (Du Plessis *Law of Unjustified Enrichment* 36 criticises this characterisation).

¹⁰³ Du Plessis *Law of Unjustified Enrichment* 236.

¹⁰⁴ J C van der Walt “Die *Condictio Indebiti* as Verrykingsaksie” (1966) 29 *THRHR* 220 224. See also De Vos *Verrykingsaanspreeklikheid* 169; S Eiselen & G Pienaar *Unjustified Enrichment: A Casebook* 3 ed (2008) 7 n (b); Du Plessis *Law of Unjustified Enrichment* 33-34.

“it is by means of an enrichment action that the law attempts to heal the wounds that it itself inflicts (by virtue of the abstract transfer of ownership).”¹⁰⁵

In South African law, a plaintiff who has lost ownership of the transferred property and who wishes to institute an enrichment claim must show that his claim meets certain general requirements: the defendant must be enriched; the plaintiff must be impoverished; the defendant's enrichment must occur at the expense of the plaintiff's impoverishment; and the enrichment must be unjustified or *sine causa*.¹⁰⁶ The plaintiff must further prove that his claim meets the requirements of a specific enrichment remedy; warrants an extension of a specific remedy by analogy; or demands the recognition of a remedy in an entirely new situation.¹⁰⁷ In the context of a formally invalid agreement, the question is which enrichment remedy is appropriate. However, before considering the appropriate enrichment remedies, it is necessary to distinguish between enrichment claims which arise because non-compliance with a formal requirement results in formal defectiveness and those which arise because non-compliance results in illegality. This issue is not merely of academic interest – whether an agreement is invalid or illegal for failure to comply with a prescribed formal requirement determines not only which enrichment remedy is available, but also whether an enrichment remedy will be awarded at all.¹⁰⁸

¹⁰⁵ Zimmermann *Law of Obligations* 867, citing H Dernburg *Bürgerliches Recht* II 3 ed (1906) as the source of this idea. See also Englard “Restitution of Benefits” in *Int Enc Comp L* X 4 n 6; R Zimmermann “Unjustified Enrichment: The Modern Civilian Approach” (1995) 15 *OJLS* 403 408.

¹⁰⁶ See *McCarthy Retail Ltd v Shortdistance Carriers* CC 2001 3 SA 482 (SCA) paras 15-25; *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 5 SA 193 (SCA) paras 17-25; Visser *Unjustified Enrichment* 156 ff; Du Plessis *Law of Unjustified Enrichment* 2, ch 2.

¹⁰⁷ Du Plessis *Law of Unjustified Enrichment* 2. On the application of an enrichment remedy in an entirely new situation, see *Kommissaris van Binnelandse Inkomste v Willers* 1994 3 SA 283 (A) 333C-E; *McCarthy Retail Ltd v Shortdistance Carriers* CC 2001 3 SA 482 (SCA) paras 8-10, in which Schutz JA recognised, albeit *obiter*, the possible introduction of a general enrichment action in the future. The role of such an action would be to accommodate those facts which do not fall within the existing enrichment framework but where enrichment liability should be recognised nevertheless. See also Visser *Unjustified Enrichment* 46 ff; Du Plessis *Law of Unjustified Enrichment* 4 ff.

¹⁰⁸ Eg the *par delictum* rule is applicable in the context of illegal agreements and could result in the denial of the plaintiff's claim for the return of his performance. See Visser *Unjustified Enrichment* 433 ff; Eiselen & Pienaar *Enrichment* 90-95; Du Plessis *Law of Unjustified Enrichment* 112.

6 3 3 2 *Statutory formalities and statutory illegality*

An agreement which is void for failure to comply with statutory formalities is not, for that reason alone, immoral or illegal.¹⁰⁹ As De Vos states:¹¹⁰

“Ongeoorloofde ooreenkomste moet nie verwar word met ooreenkomste wat ongeldig is omdat ‘n formaliteit wat deur die reg voorgeskryf is, nie nagekom is nie ... Waar die reg ... ‘n bepaalde *vorm* as geldigheidsvereiste stel, kan mens nie by nie-nakoming van die vereiste van *ongeoorloofdheid* praat nie. Die ooreenkoms is wel nietig weens ‘n vormgebrek maar geensins ongeoorloof nie. Geoorloofdheid en nakoming van vormvereistes is twee afsonderlike vereistes vir geldigheid.”¹¹¹

If the agreement is void only because it does not comply with statutory formalities therefore, the appropriate enrichment remedy is not the *condictio ob turpem vel iniustam causam*, the central requirement of which is that performance must have occurred in terms of an illegal agreement.¹¹² By contrast, if the content or goal of an agreement subject to formalities is prohibited by public policy or statute, then this remedy would be appropriate.¹¹³ The difficulty, however, lies in determining whether a particular statutory provision amounts to the prescription of a formal requirement or whether it is prescribing a requirement for the legality of the agreement.¹¹⁴

¹⁰⁹ *Pottie v Kotze* 1954 3 SA 719 (A) 725A; *Tuckers Land and Development Corporation (Pty) Ltd v Wasserman* 1984 2 SA 157 (T) 161A-G.

¹¹⁰ *Verrykingsaanspreeklikheid* 153.

¹¹¹ 162 (italics in the original).

¹¹² *Afrisure CC v Watson NO* 2009 2 SA 127 (SCA) para 5; Visser *Unjustified Enrichment* 418; Eiselen & Pienaar *Enrichment* 81; Du Plessis *Law of Unjustified Enrichment* 111; J C Sonnekus *Unjustified Enrichment in South African Law* (tr J E Rhodie) (2008) 262.

¹¹³ Visser *Unjustified Enrichment* 425. This is illustrated, *inter alia*, in the discussion of cases like *Dugas v Kempster Sedgwick (Pty) Ltd* 1961 1 SA 784 (D) and *Lydenburg Voorspoed Ko-operasie v Els* 1966 3 SA 34 (T) by De Vos *Verrykingsaanspreeklikheid* 164. The author suggests that the appropriate enrichment action in these cases was the *condictio ob turpem vel iniustam causam* because too much credit had been given in certain hire-purchase agreements which rendered the *content* of these agreements illegal and not simply void for failure to comply with the formal requirements set out in the Hire Purchase Act 36 of 1942.

¹¹⁴ The same point is made in Eiselen & Pienaar *Enrichment* 89-90 n (b); Du Plessis *Law of Unjustified Enrichment* 113-114.

For example, in *Watson NO v Shaw NO*¹¹⁵ (“*Watson*”) an agreement was concluded between a medical scheme and an insurance broker, in terms of which the latter would receive certain payments for the introduction of members to the scheme. Some of these payments constituted broker’s commission and fell within the limit prescribed by statute.¹¹⁶ Other payments were characterised as a periodic “service fee”.¹¹⁷ For the purposes of this discussion, the focus is on that part of the agreement relating to the legitimate broker’s commission.

Fourie J was required to determine whether the agreement to pay broker’s commission was formally defective or whether it was in fact illegal. Regulation 28(1)(d) of the Medical Schemes Act 131 of 1998 (“Medical Schemes Act”) provides that the parties must conclude a prior written agreement regarding broker’s commission, while section 66(1)(a) of the Act makes non-compliance with any provision of the Act (which includes the regulations) a criminal offence. Before its deletion from the Act, section 66(1)(f) specifically provided that the failure to comply with the requirements prescribed for the conclusion of an agreement to pay broker’s commission amounted to an offence.

According to the defendants, non-compliance with regulation 28(1)(d) rendered the agreement formally defective but not illegal. Fourie J disagreed:

“[T]here is no room for an interpretation of reg 28(1)(d) which relegates its requirement of a prior written agreement to a mere formality ... [T]he regulation is explicit in prohibiting payment in the absence of a prior written agreement ... [W]hat the legislature intended by means of this absolute prohibition, is that payment of broker fees in the absence of a prior written agreement is to be regarded as void and of no effect. This intention of the legislature is ... underscored by s 66(1)(f), which criminalises the payment of compensation to a broker, other than in terms of the prescribed conditions, ie in terms of a prior written agreement ... [I]n prescribing a prior written agreement, the legislature did not merely impose a formality upon the contracting parties, but provided a statutory inroad into their contractual relationship in order to protect the interests of not only the scheme and broker, but also the interests of members of medical schemes ... [T]hese indicia permit only one conclusion to be drawn, namely that the legislature intended to render payments made contrary to the provisions of reg 28(1)(d) void. It follows in

¹¹⁵ 2008 1 SA 350 (C).

¹¹⁶ Para 16. See reg 28(2) of the Medical Schemes Act 131 of 1998.

¹¹⁷ Para 16.

my view that the legislature intended to render an oral agreement to pay broker fees ...illegal.”¹¹⁸

This portion of Fourie J’s judgment shows that he confuses two questions, namely whether the agreement is illegal or formally defective on the one hand, and the further question of the appropriate consequence of non-compliance.

The fact that the legislature intended that a particular agreement should be void for failure to comply with a formal requirement is an indication that it considered that requirement to be in the public interest. As discussed above,¹¹⁹ invalidity is generally a consequence reserved for formal provisions which promote broader social aims, like the prevention of fraud and perjury. However, the mere fact that such a provision promotes broader social aims and that for this reason, non-compliance results in nullity, is not sufficient to conclude that it is necessarily illegal; the public interest could be equally well-served by concluding that the failure to comply with the prescribed requirements renders the agreements to pay broker’s commission void for formal defectiveness only. Invalidity is not reserved exclusively for illegal agreements and it cannot be decisive of the question whether non-compliance should be characterised as a formal defect or an illegality. Thus it is suggested that the more convincing indicator of illegality in this case (although not necessarily invalidity¹²⁰) was the fact that provisions of the Medical Schemes Act explicitly criminalised a brokerage agreement which did not comply with the regulation 28(1) (a consequence which is not evident in statutes which prescribe formal requirements for the sake of formal validity alone).

Unfortunately, this confusion was not addressed on appeal in *Afrisure CC v Watson NO*.¹²¹ There the court concluded that the payments of a “service fee” were in fact broker’s commission in disguise; that this was illegal because it was *in fraudem legis*; and that therefore the entire agreement (including the broker’s commission which fell within the

¹¹⁸ Para 28.

¹¹⁹ See 6 2 3.

¹²⁰ Although a criminal sanction is often interpreted as an indication that the offending agreement is void, it may be that “the sanction provides adequate protection against the mischief that that the statute is directed against” in which case a further civil sanction is unnecessary. See Floyd “Legality” in *The Law of Contract in South Africa* 182.

¹²¹ 2009 2 SA 127 (SCA).

statutorily prescribed amount, but which was not the subject of a prior written contract) was tainted by this illegality.¹²² However, it did not appear to disagree with Fourie J's conclusion that non-compliance with the formal requirements set out in regulation 28(1)(d) rendered the agreement illegal, and not merely formally defective,¹²³ although it left open the question whether this agreement, in not complying with the prescribed formal requirements, would be illegal and therefore void or illegal and merely unenforceable.

In the *Watson* case, the statute itself facilitated the conclusion that non-compliance with the prescribed formal requirement rendered the agreement illegal. However, determining whether one is dealing with an agreement which is formally defective or illegal for failure to comply with a formal requirement becomes more difficult when a particular statute contains no indication pointing to either conclusion.

An example of such a statute is the Contingency Fees Act 66 of 1997 ("the Contingency Fees Act"). At common law, an agreement in terms of which an outsider agreed to provide financial assistance to a potential litigant in exchange for a share of the proceeds should the latter be successful, was regarded as an illegal *pactum de quota litis*.¹²⁴ The same applied to an agreement in terms of which a party was thought to "traffic, gamble or speculate in litigation."¹²⁵ Contingency fee agreements between a legal representative and his client also fell within the prohibition until the promulgation of the Contingency Fees Act.

This Act makes provision for two types of contingency fee agreements: "no win, no fees" agreements¹²⁶ and agreements which entitle the legal representative to a higher than

¹²² Paras 34-38.

¹²³ Paras 37-38.

¹²⁴ *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd* 2004 6 SA 66 (SCA) para 26.

¹²⁵ Para 26. An exception to the rule prohibiting these types of agreements was recognised when the financial assistance was given in good faith to a litigant who had a valid claim to defend – in these circumstances, the agreement was not considered illegal (para 27). In any event, the Supreme Court of Appeal has now ruled that a *pactum de quota litis* between an outsider and a litigant, in which the former becomes entitled to a share of the proceeds should the litigant be successful, is no longer contrary to public policy (para 46).

¹²⁶ S 2(1)(a).

normal fee if the client is successful, provided the fee remains within certain limits.¹²⁷ Both types of agreements must be recorded in a prescribed written form and signed by the relevant parties.¹²⁸ However, the Act does not indicate whether non-compliance with these formal requirements renders a particular contingency fee agreement formally defective only, or illegal as well. Case law is also not particularly instructive, although it tends towards the latter conclusion.

In *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd*,¹²⁹ the court held that

“[t]he [Contingency Fees] Act was enacted to legitimise contingency fee agreements between legal practitioners and their clients which would otherwise be prohibited by the common law. Any contingency fee agreement between such parties which is not covered by the Act is therefore illegal.”¹³⁰

The last sentence of this quotation is ambiguous. It is not clear whether the court intended to include those contingency fee agreements which, although formulated with the Act in mind, do not comply with the prescribed formal requirements. Are these also contingency fee agreements “not covered by the Act”, leading to the conclusion that they are illegal and not merely formally defective? Apparently so, according to *Tecmed (Pty) Ltd v Hunter*¹³¹ (“*Tecmed*”).

In this case the respondent attorney concluded an oral *pactum de quota litis* with the applicant, which would entitle him to a performance bonus if he successfully defended a claim which had been instituted against it. Hunter misled the applicant into believing that the claim was successfully defended and the performance bonus was subsequently paid. Upon realising that it had been misled, the applicant claimed the return of what it had paid. Since the agreement in *Tecmed* did not comply with the formal requirements set out in the Contingency Fees Act, Van Rooyen AJ concluded that the agreement was “unlawful and

¹²⁷ S 2(1)(b) read with s 2(2).

¹²⁸ S 3(1)(a) read with s 3(2).

¹²⁹ 2004 6 SA 66 (SCA).

¹³⁰ Para 41.

¹³¹ 2008 6 SA 210 (W).

void”¹³² and that “[w]hatever was paid in accordance with the pactum is recoverable by the applicant by way of the *condictio ob turpem vel iniustam causam*.”¹³³

While the acting judge indicated that a contingency fee agreement which does not comply with the prescribed formalities is illegal, he did not state his reasons for coming to this conclusion.¹³⁴ According to Sharrock, the judge’s conclusion is incorrect, because it confuses a defect in form with illegality.¹³⁵ He points out that the agreement between the applicant and respondent was formulated with the provisions of the Contingency Fees Act in mind, because the performance bonus fell within the limitations imposed by section 2(2) of the Act.¹³⁶ The Act also does not expressly or impliedly prohibit the conclusion of contingency fee agreements which do not comply with the formal requirements set out in section 3.¹³⁷ This leads Sharrock to conclude that the parties in *Tecmed* had concluded a lawful, albeit formally defective, contingency fee agreement. As a result, the appropriate enrichment remedy on these facts was not the *condictio ob turpem vel iniustam causam*.¹³⁸

While there is some merit in Sharrock’s argument, it is ultimately not convincing. The absence of a statutory provision prohibiting the conclusion of formally defective contingency fee agreements does not necessarily indicate that they are therefore legal. It could equally be a reflection of the fact that the legislature was aware of the common-law position (contingency fee agreements are illegal) and that any additional reference to this in the Act would have been superfluous. There is in any event an interpretative presumption that a statute is not intended to alter the existing common law more than necessary.¹³⁹ Indeed, Visser states that the Contingency Fees Act only partially removes

¹³² Para 29.

¹³³ Para 29.

¹³⁴ See also H Scott “Unjustified Enrichment” 2008 ASSAL 1249 1250.

¹³⁵ “Contract” (October to December 2008) *JQR* para 2.3.1 <<http://ipproducts.jutalaw.co.za.ez.sun.ac.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu>> (accessed 03-11-2012).

¹³⁶ Para 2.3.1 n 12.

¹³⁷ Para 2.3.1 n 13.

¹³⁸ Para 2.3.1.

¹³⁹ See eg L du Plessis *Re-Interpretation of Statutes* (2002) 177 ff.

a *pactum de quota litis* from the ambit of common-law illegality.¹⁴⁰ According to this writer, any agreement which does not comply with the formal requirements laid down by the Act, or which amounts to a simple agreement to give a legal representative a percentage of the award in a case, should still be regarded as illegal. Visser's argument receives some support, albeit *obiter*, in the recent judgment in *Thulo v Road Accident Fund*¹⁴¹ ("*Thulo*") in which the following statements are made:

"The legislature has expressly recognised that the civil-justice system is strong enough to withstand the abuses which could arise as a result of contingency-fee agreements between legal practitioners and their clients and it has made such agreements legal within carefully circumscribed limits".¹⁴²

Therefore

"[a] contingency fee must thus be raised in accordance with the [Contingency Fees] Act or it is unlawful."¹⁴³

These comments suggest that contrary to Sharrock's argument, a contingency fee agreement which does not comply with the relevant formal requirements remains illegal, and is not rendered merely formally defective.

If this is indeed what the court intended to convey in the *Thulo* judgment, then it is arguable that this conclusion should be supported. Contingency fee agreements can create a conflict of interest between a legal representative's responsibilities to his client and his duty as an officer of the court.¹⁴⁴ This concern does not disappear simply because certain contingency fee agreements may now be concluded in writing. Furthermore, if the legislature intended non-compliance with the writing requirement to result in formal defectiveness only, it is not clear why it felt the need to provide that a contingency fee agreement should specify "the manner in which any amendment should be dealt with".¹⁴⁵

¹⁴⁰ *Unjustified Enrichment* 431.

¹⁴¹ 2011 5 SA 446 (GSJ).

¹⁴² Para 49.9.

¹⁴³ Para 49.11.

¹⁴⁴ See *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd* 2004 6 SA 66 (SCA) paras 38, 45.

¹⁴⁵ S 3(3)(i).

It is a settled principle that any variation to an agreement subject to statutory formalities must be in writing.¹⁴⁶ Again, if the intention was that formal non-compliance should render contingency fee agreements formally defective only, the provision relating to amendments of these agreements is superfluous.

Leaving aside the overlap between illegality and formal defectiveness and the possibility that the *condictio ob turpem vel iniustam causam* may be the appropriate enrichment remedy in the event of such an overlap, which enrichment actions are available to a party who has performed in terms of an agreement which is void solely for failure to comply with statutory formalities?

Two possible actions have been proposed.¹⁴⁷ Where the party who performs labours under the mistaken belief that the formalities were complied with when they were not, the appropriate enrichment remedy is the *condictio indebiti*.¹⁴⁸ Where however, the party who performs knows that the agreement is formally invalid, but does so because he assumes that the other party will also perform, the appropriate remedy is the *condictio causa data causa non secuta*.¹⁴⁹ In the following two sections, these enrichment remedies will be discussed, in the context of formally invalid suretyships and sales of land respectively.

6 3 3 3 *Enrichment remedies and formally invalid suretyships*

According to Visser,¹⁵⁰ a surety who pays in terms of a formally defective suretyship would be doing so either by mistake or to pay the debt of the principal debtor in any event. He would not, however, be paying to achieve a future purpose. The only enrichment remedy which could be available to a paying surety in these circumstances therefore would be the *condictio indebiti*.

¹⁴⁶ See ch 4 (4 3 5).

¹⁴⁷ See De Vos *Verrykingsaanspreeklikheid* 183; D Visser “Unjustified Enrichment” in F du Bois (ed) *Wille’s Principles of South African Law* 9 ed (2007) 1041 1067; Visser *Unjustified Enrichment* 459-460.

¹⁴⁸ *Enocon Construction (Pty) Ltd v Palm Sixteen (Pty) Ltd* 1972 4 SA 511 (T); *Botes v Toti Development Co (Pty) Ltd* 1978 1 SA 205 (T).

¹⁴⁹ *Kennedy and Kennedy v Lanyon* 1923 TPD 284; *Pucjowski v Johnston’s Executors* 1946 WLD 1.

¹⁵⁰ *Unjustified Enrichment* 471.

Visser does not expand upon these statements. In order to determine how the author comes to this conclusion, the following example is used as illustration. C lends a sum of money to D and, for added security, concludes a suretyship agreement with S in terms of which S will repay the loan amount should D fail to do so. However, the suretyship is formally invalid. When D defaults on the debt, C claims the amount of the loan from S, who pays in the mistaken belief that he is obliged to do so. Can he now reclaim the amount with the *condictio indebiti*?

As a point of departure, it should be borne in mind that there are at least two obligations relating to the repayment of the loan in this example: the first is created by the principal agreement between C and D, and the second created by the suretyship between C and S. In *Gerber v Wolson*,¹⁵¹ Van den Heever JA noted that

“[t]he obligation of a surety and that of a principal debtor frequently have the same economic content, especially where the principal obligation sounds in the payment of a sum of money, but they are different obligations”.¹⁵²

Secondly, a successful claim based on the *condictio indebiti* must prove, among other things, that the payment was made *indebite*: there must have been no obligation, whether legal or natural, to make it.¹⁵³ It is problematic in the above example that there is a valid obligation, created by the principal agreement between C and D, but no valid obligation created by the formally defective suretyship between C and S. How then could a *condictio indebiti* be available to the surety if there is in fact a valid obligation to discharge, albeit it one which exists between C and D?

The answer, it seems, lies in the theoretical explanation of performance as a means to discharge a debt. According to South African law, performance will only discharge a debt if the actual act of performance is accompanied by a debt-extinguishing agreement.¹⁵⁴

¹⁵¹ 1955 1 SA 158 (A).

¹⁵² *Gerber v Wolson* 1955 1 SA 158 (A) 166G. See also G F Lubbe & C Murray *Farlam & Hathaway Contract - Cases, Materials and Commentary* 3 ed (1988) 399 n 5.

¹⁵³ *Frame v Palmer* 1950 3 SA 340 (C) 346E-F; Visser *Unjustified Enrichment* 285-286; J G Lotz & F D J Brand “Enrichment” in W A Joubert & J A Faris (eds) *LAWSA* 92 ed (2005) para 212 (d).

¹⁵⁴ Van der Merwe et al *Contract* 440-441; J C de Wet & A H van Wyk *Die Suid-Afrikaanse Kontraktereg & Handelsreg* 1 5 ed (1992) 5; *B & H Engineering v First National Bank of SA Ltd* 1995 2 SA 279 (A) 287G.

However, an effective debt-extinguishing agreement presupposes that there is in fact a valid debt to discharge.¹⁵⁵ Furthermore, a surety who pays in terms of a suretyship usually intends to discharge his own debt, and not the debt of the principal debtor.¹⁵⁶ The fact that the surety undertakes to pay on behalf of the principal debtor should the latter be unable to do so, does not change the fact that the surety's obligation is separate from that of the principal debtor, and that the surety intends to discharge his own obligation, and not that of the principal debtor.

Therefore, a surety who mistakenly pays in terms of a formally defective suretyship can reclaim his payment with the *condictio indebiti*,¹⁵⁷ because he intends to discharge his own

For criticism of this approach, see J E du Plessis "Die Regsaard van Prestasie" (2002) 65 *THRHR* 59; Du Plessis *Law of Unjustified Enrichment* 62.

¹⁵⁵ See the *obiter* remarks to this effect in *B & H Engineering v First National Bank of SA Ltd* 1995 2 SA 279 (A) 291G, 295F-G.

¹⁵⁶ Support for this reasoning can be found in the explanation provided by South African courts as to why a surety who has performed in terms of a valid suretyship is entitled to a cession of actions from the creditor after payment. In Roman law, there was only one debt created in the triangular relationship between creditor, principal debtor and surety. This debt was extinguished upon payment by the surety, which meant that a cession of rights by the creditor to the surety was not possible because there was nothing left to cede. This resulted in the fiction that the creditor sold his claims to the surety upon payment of the debt, the purchase price being the amount paid by the surety (see C F Forsyth & J T Pretorius *Caney's The Law of Suretyship* 6 ed (2010) 146-147). In modern SA law however, and as pointed out in the main text above, it is now recognised that there are at least two obligations created by the creditor-debtor-surety relationship: one between the creditor and surety, and another between the creditor and principal debtor. South African courts have explained that a surety does not intend to discharge the principal debtor's obligation, but only his own accessory debt. For this reason, a cession of rights against the principal debtor is still possible. See *Gerber v Wolson* 1955 1 SA 158 (A) 167A (per Van den Heever JA); *African Guarantee & Indemnity Co Ltd v Thorpe* 1933 AD 330 337 per Wessels CJ. This reasoning is criticised in J J Henning & K L Mould "Suretyship" in J A Faris & L T C Harms (eds) *LAWSA* 26 2 ed (2011) para 300 on the basis that it is not consistent with the notion that the surety undertakes "to pay the principal debtor's debt if the latter fails to pay it him- or herself". This argument fails to recognise that the surety undertakes to pay an amount which is equal to, or less than, the principal debt (Forsyth & Pretorius *Suretyship* 102) and not the principal debt itself.

¹⁵⁷ This is assuming that a court concludes that the mistake was also excusable (see *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* 2009 1 SA 196 (SCA) paras 24, 29-30; Du Plessis *Law of Unjustified Enrichment* 132 ff), a conclusion which appears to depend on the facts of the case (see eg *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 4 SA 202 (A) 224E-G). For criticism of both the mistake requirement and the notion that such a mistake must be excusable in order to claim with this *condictio*, see Du Plessis *Law of Unjustified Enrichment* 135-139, 168-171; Visser *Unjustified Enrichment* 316-331; H Scott "The Requirement of Excusable Mistake in the Context of the *Condictio Indebiti*: Scottish and South African Law Compared" (2007) 124 *SALJ* 827 854 ff.

debt, which does not exist because the suretyship agreement is formally invalid. However, this enrichment claim would not be available if the surety knew that the suretyship was invalid but paid in any event: there is no mistaken belief that the debt is due and, in the absence of some other recognised ground justifying the application of this enrichment claim, the surety will not be entitled to institute the *condictio indebiti*.¹⁵⁸ A surety who pays knowing that he has no obligation to do so, must be doing so because he intends to discharge the principal debtor's obligation and not his own.¹⁵⁹ In this type of fact pattern, the surety's payment will discharge the valid principal obligation and he will not be able to reclaim the payment from the creditor.

There appears to be no direct judicial authority either supporting or refuting this analysis, or indeed Visser's statement that a surety who pays in terms of a formally invalid suretyship may reclaim his payment with the *condictio indebiti*. However, it should be pointed out that it is considered self-evident in German law that a surety who has mistakenly paid in terms of a formally invalid suretyship is entitled to reclaim that payment because it was *indebitum*.¹⁶⁰

It is suggested that there may be practical reasons for the lack of South African case law on this point. First, because the surety, as surety, often receives no direct benefit for undertaking such an onerous obligation, it is likely that when the creditor attempts to enforce the suretyship, the surety will seek to raise all possible defences to avoid paying the debt, including the formal invalidity of the agreement. It is therefore unlikely that a surety will only establish that the agreement was formally invalid after he has paid the creditor.

¹⁵⁸ *Frame v Palmer* 1950 3 SA 340 (C) 346F; J G Lotz & F D J Brand "Enrichment" in *LAWSA* 9 para 212 (e); Visser *Unjustified Enrichment* 290 ff; Du Plessis *Law of Unjustified Enrichment* 97. A basic element of the *condictio indebiti* is a mistake as to liability. If the plaintiff knew that the agreement was invalid but paid in any event, then the *condictio indebiti* will generally only be available if he can show that he was compelled to pay, and did so under protest (see eg Du Plessis *Law of Unjustified Enrichment* 139 ff; there are instances where this enrichment claim is awarded even in the absence of mistake or compulsion (148-151), but these are not relevant to the discussion in the main text).

¹⁵⁹ Again, this is assuming that there was no other reason for the surety to pay a debt which he knew was not due, like the threat of possible harm if he fails to pay (see n 158).

¹⁶⁰ S Lorenz "§ 812" in N Horn (ed) *Staudinger BGB: Recht der Schuldverhältnisse §§ 812-822 (Ungerechtfertigte Bereicherung)* (2007) n 47.

Secondly, it is possible that due to the nature of the relationship between the surety and principal debtor, the surety prefers to pay and to reclaim the amount from the debtor, without having to deal with the validity of the suretyship. In other words, he would be paying the debt while knowing that the suretyship is formally invalid. In such a case, the *condictio indebiti* would be excluded for the reasons stated above.

Whatever the reason for the paucity of case law, any further discussion would become ever more speculative. However, one last point should be noted: to the extent that there has been full performance of a formally invalid suretyship, it is possible that a surety may be precluded from reclaiming his performance with the *condictio indebiti*. This is certainly the case in German law, where the third sentence of paragraph 766 BGB provides that full performance by a surety cures the defect in form. It is unclear whether this curative effect of performance in terms of a formally invalid suretyship would also be recognised in South African law. The Supreme Court of Appeal has formulated a general rule that full performance by both parties precludes any enrichment claim (unless the agreement is illegal).¹⁶¹ However, it is unclear whether this rule was intended to be applicable only to reciprocal performances or to unilateral ones as well. This aspect will be examined in greater detail towards the end of this chapter.¹⁶²

6 3 3 4 *Enrichment remedies and void sales of land*

6 3 3 4 1 *Introduction*

Depending on the facts, the South African common law traditionally awarded either the *condictio indebiti* or the *condictio causa data causa non secuta* to a party who had performed in terms of a formally invalid contract for the sale of land. The former remedy was available when the party who had performed did so in the mistaken belief that the agreement was valid (ie the transfer was made to fulfil an obligation which did not exist).¹⁶³ The latter remedy became available when the performance was made, not to discharge an apparently existing obligation, but to elicit a future counter-performance. If the counter-performance failed to eventuate, the performing party could reclaim the transfer with the

¹⁶¹ *Legator McKenna Inc v Shea* 2010 1 SA 35 (SCA) para 28.

¹⁶² See 6 5.

¹⁶³ Du Plessis *Law of Unjustified Enrichment* 190.

condictio causa data causa non secuta.¹⁶⁴ The common-law position has been superseded by section 28(1) of the Alienation of Land Act which now provides a statutory enrichment claim to a party who has performed in part or in full pursuant to such a contract.¹⁶⁵ Nevertheless, an overview of case law preceding the promulgation of the Act is useful, both because it highlights some peculiar aspects of the common-law approach (which has not been overturned explicitly) and because it places the provisions of the Act in context.¹⁶⁶

6 3 3 4 2 *The South African approach at common law: the rule in Carlis v McCusker*

In *Carlis v McCusker*¹⁶⁷ (“*Carlis*”), the parties had concluded an oral agreement for the sale of land. The plaintiff had paid part of the purchase price, but the defendant failed to transfer the land, leaving him with both the money and the land. The plaintiff sought to reclaim his payment.

As his point of departure, Innes CJ stated that since

“no man should be allowed to enrich himself at the expense of another, [a court] would not permit a man, who had verbally agreed to sell landed property, and had on faith of that agreement received the whole or portion of the purchase-price, to retain both the money and the land.”¹⁶⁸

¹⁶⁴ Du Plessis *Law of Unjustified Enrichment* 189-190. Historically, the *condictio causa data causa non secuta* developed in Roman law to assist a party to reclaim a performance which had been made in terms of an agreement which did not fit into the fourfold division of valid contracts (Zimmermann *Law of Obligations* 843-844). With the recognition that all agreements are enforceable as a general rule, the scope of application of the claim is limited in modern law: someone who performs in order to receive a counter-performance usually does so because a contract has been concluded between the parties (Zimmermann *Law of Obligations* 861). The appropriate remedy for the party who does not receive the counter-performance is one based on breach of contract, and not an enrichment claim. The *condictio causa data causa non secuta* is therefore limited to situations in which there has been performance in the absence of a contract and the *condictio indebiti* or some other enrichment remedy is not applicable (861-862).

¹⁶⁵ Similar statutory enrichment actions are created by s 9(1) of the Property Time-Sharing Control Act 75 of 1983, s 18(1) of the Share Blocks Control Act 59 of 1980 and s 8(1) of the Housing Development Schemes for Retired Persons Act 65 of 1988.

¹⁶⁶ Visser *Unjustified Enrichment* 460.

¹⁶⁷ 1904 TS 917.

¹⁶⁸ 923.

In such cases, the court would come to the assistance of the buyer. However, this general principle was qualified by Innes CJ to the extent that where the defendant was willing and able to perform his part of the bargain, no remedy would be available to the plaintiff despite the fact that the contract was void.¹⁶⁹ The reason for this rule was policy-based:

“[I]f the seller, acting in good faith, were willing and able to carry out his part of the inchoate understanding, on faith of which the money was paid, ... [t]here would be no equity entitling the buyer under such circumstances to the assistance of the Court.”¹⁷⁰

In other words, the *Carlis* rule is an attempt to prevent formal requirements from being abused by a party who seeks to escape an agreement which, although it is formally defective, was nevertheless seriously intended.¹⁷¹

Despite the laudable objective of the rule, it has nevertheless been subjected to criticism. One of the main points of criticism is that Innes CJ cited no authority for his proposition that where the defendant is willing and able to perform, the other party has no claim for the return of its performance.¹⁷² It has also been pointed out that the rule has no basis in the South African common law of unjustified enrichment.¹⁷³

As a result, the argument has been made that the rule has its roots in English law.¹⁷⁴ For example, in *Thomas v Brown*¹⁷⁵ (“*Thomas*”) the purchaser sought to reclaim her deposit paid in terms of an agreement which was unenforceable because it failed to comply with the Statute of Frauds. Quain J refused to award the claim on the basis that the seller had

¹⁶⁹ 923.

¹⁷⁰ 923.

¹⁷¹ See Lubbe & Murray *Contract* 206 n 4; L Tager “General Principles of Contract” 1979 ASSAL 87 105-106; G F Lubbe “Law of Purchase and Sale” 1979 ASSAL 136 139-140.

¹⁷² *Patel v Adam* 1977 2 SA 653 (A) 668H; *CD Development Co (East Rand) (Pty) Ltd v Novick* 1979 4 All SA 22 (C) 26.

¹⁷³ Eiselen & Pienaar *Enrichment* 140-141 n (a); Visser *Unjustified Enrichment* 462.

¹⁷⁴ See Visser *Unjustified Enrichment* 462; Eiselen & Pienaar *Enrichment* 140-141 n (a); E Kahn “General Principles of Contract” in H R Hahlo & E Kahn (eds) *The Union of South Africa: The Development of its Laws and Constitution* (1960) 441 483.

¹⁷⁵ (1876) 1 QB 714. See also *Monnickendam v Leanse* (1923) 39 TLR 445.

always been ready and willing to perform his side of the bargain.¹⁷⁶ Thus, “as far as the restitutionary consequences of [contracts which have been partly performed] were concerned [Innes CJ] appears to have looked to decisions such as [*Thomas*], where a similar rule to that applied in [*Carlis*] is laid down.”¹⁷⁷ To understand this statement fully, it is necessary to provide a brief overview of the English approach to enrichment claims.

6 3 3 4 3 *The English law on unjust enrichment*

In modern English law, a party who has performed in terms of a formally defective agreement is entitled to a claim for restitution, based on unjust enrichment. The dominant English approach to unjust enrichment does not work with a set of general requirements which must be proved in addition to the elements of a specific enrichment claim.¹⁷⁸ Rather,¹⁷⁹ in addition to proving that the defendant has been enriched by the receipt of a benefit gained at the claimant’s expense, the claimant must also indicate that it would be inequitable for the defendant to retain the benefit, due to the presence of an unjust factor.¹⁸⁰ The mere fact that a contract is void is not sufficient to justify restitution, according to the orthodox view; similarly, the fact that a contract is unenforceable does not automatically preclude restitution: the decisive criterion is the presence or absence of an unjust factor.¹⁸¹

¹⁷⁶ *Thomas v Brown* (1876) 1 QB 714 723.

¹⁷⁷ H Scott *Unjust Enrichment by Transfer in South African Law: Unjust Factors or Absence of Legal Ground?* DPhil thesis Oxford (2005) 294 (footnote omitted); Visser *Unjustified Enrichment* 462.

¹⁷⁸ See 6 3 3 1 above.

¹⁷⁹ This is the prevailing view. P Birks *Unjust Enrichment* 2 ed (2005) ch 5 was of the opinion that a series of cases in the 1990s dealing with interest rate swap transactions indicated that English law had in fact adopted a civilian approach to enrichment law, because they illustrated that proof of an absence of basis was sufficient to succeed with a claim for restitution. These swap transactions are discussed in 6 5 below.

¹⁸⁰ C Mitchell, P Mitchell & S Watterson (eds) *Goff & Jones The Law of Unjust Enrichment* 8 ed (2011) 7-8.

¹⁸¹ See G McMeel *The Modern Law of Restitution* (2000) 172; S Meier “Restitution after Executed Void Contracts” in P Birks & F Rose (eds) *Lessons of the Swaps Litigation* (2000) 168 170, 172; G Virgo *The Principles of the Law of Restitution* 2 ed (2006) 127 ff. It should be pointed out that simply because a common-law court awards a claim for restitution when the contract is unenforceable does not mean that unenforceability and voidness are regarded as synonymous (A Burrows *The Law of Restitution* 3 ed (2011) 105; Birks *Unjust Enrichment* 126-127). Doctrinally, a claim for restitution is available where an agreement is unenforceable because the basis

One such unjust factor is the failure of consideration. Consideration in the context of restitution does not mean, as in the English law of contract, the parties' reciprocal promises.¹⁸² Rather, it means the performance of those promises:

"Consideration in this restitutionary sense refers to the condition which formed the basis for the claimant transferring a benefit to the defendant. It is when this condition fails that it is possible to conclude that the consideration has failed".¹⁸³

The condition referred to here is performance by the defendant. This is similar to the field of application of the *condictio causa data causa non secuta*, which operates when the plaintiff knows that the contract does not comply with statutory formalities and is therefore void, but performs in the expectation that the defendant will deliver his counter-performance.¹⁸⁴

The question which arises is how the claimant must prove that there has been, or will be, a failure of consideration. This can be shown in one of two ways: either he must prove that the contract has ceased to be operative or he must prove that the defendant is no longer willing and able to perform.¹⁸⁵ In the case of the former, the need to show that the contract

"of such an action lies not in agreement but in restitution and the claim in restitution involves not enforcing the agreement but recovering compensation on the basis that the agreement is unenforceable." (*Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 (HCA) para 19 per Deane J).

However, awarding a restitutionary claim in this context does mean that a court must consider whether such an award does not defeat the policy considerations underlying the declaration of unenforceability. This is considered in greater detail further in the main text.

¹⁸² Virgo *Principles of Restitution* 306.

¹⁸³ Virgo *Principles of Restitution* 306. The leading case on the meaning of consideration in the restitutionary sense is *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 48.

¹⁸⁴ As is apparent in the following statement in *Kennedy and Kennedy v Lanyon* 1923 TPD 284 287-288:

"[T]he plaintiff's claim rested upon the defendant's inability or unwillingness to complete the contract. If either is proved, the failure of consideration for the payment of the money, which is the foundation of the *condictio* [*causa data causa non secuta*], would be established. So long as the defendant is ready and able to implement his bargain there is no failure of consideration and the plaintiff cannot recover money paid in pursuance of the inchoate contract."

¹⁸⁵ Virgo *Principles of Restitution* 310-311. However, see Burrows *Restitution* 326 who argues that the requirements are cumulative, rather than in the alternative. According to McMeel *Modern Law of Restitution* 191, there appears to be no reason in principle why this should be so and Mitchell et al (eds) *The Law of*

has been terminated is to ensure that the law of restitution does not challenge the law of contract: while the contract remains operative, contractual rather than restitutionary remedies must be awarded.¹⁸⁶ Once the contract ceases to be operative however, the contractual obligations are terminated and it follows automatically that the defendant is no longer able to perform his contractual promise.¹⁸⁷ The latter alternative – proof that the defendant is unwilling or unable to perform – is important in the context of agreements which are unenforceable because they fail to comply with statutory formalities. Here it is unnecessary to terminate the contract, because the law in any event does not recognise the contract as enforceable. However, because the contract remains valid, it is necessary to prove that the defendant is no longer willing and able to perform,¹⁸⁸ since it is only when the defendant is unable or unwilling to perform that one can say that there has been or will be a failure of consideration.

An additional factor which a court will need to consider before it grants a restitutionary award in the context of an unenforceable contract, is whether such an award would undermine the policy considerations which rendered the contract unenforceable in the first place.¹⁸⁹ This is illustrated in the Australian case of *Pavey & Matthews Pty Ltd v Paul*.¹⁹⁰

The claimants were builders who had completed work for the defendant. She refused to pay the sum which they maintained was due. The New South Wales Licensing Act 1971 prescribed unenforceability for building contracts which had not been reduced to writing. In principle, the builders were entitled to a claim for restitution (due to the failure of consideration) and the court had to address the question whether allowing such a claim would subvert the policy of the Act. According to the court it would not – the policy underlying the imposition of writing (to prevent spurious claims against customers, and not to protect customers who had requested and accepted the work)¹⁹¹ would not be circumvented by making a restitutionary award. This conclusion is supported by Birks:

Unjust Enrichment argue that the “willing and able” requirement should be reserved for cases falling within the ambit of the Statute of Frauds.

¹⁸⁶ Virgo *Principles of Restitution* 310-311.

¹⁸⁷ 313-314.

¹⁸⁸ 314, 350.

¹⁸⁹ See Virgo *Principles of Restitution* 351; Birks *Unjust Enrichment* 256; Burrows *Restitution* 105.

¹⁹⁰ (1987) 162 CLR 221 (HCA).

¹⁹¹ Para 14 per Mason and Wilson JJ.

"[T]he desirable certainty promoted by the requirement of writing was sufficiently sanctioned by depriving the builder of his claim in contract. It did not require to be reinforced by barring even his claim in unjust enrichment, thus leaving him unpaid for work actually done and accepted."¹⁹²

Returning to the unjust factor of failure of consideration, this ground can also justify an award of restitution in the case of invalid contracts. However, there does not appear to be an English case in which the contract was invalid (as opposed to merely unenforceable) and the court denied restitution simply on the basis that the defendant was willing and able to perform.¹⁹³ Instead, failure of consideration is measured here according to whether the plaintiff actually received the expected counter-performance.¹⁹⁴ It therefore appears that there is no foundation in modern English law for the view of Innes CJ in *Carlis* that the English "willing and able" defence would preclude an enrichment claim for the return of a performance made in terms of a void contract.

6 3 3 4 4 *Back to the South African common-law approach: criticism of the Carlis rule*

The application of the *Carlis* rule in the South African context leads to a stalemate: the defendant may rely on a void agreement as defence to an enrichment claim, without being bound to carry out his own part of the agreement; the plaintiff, in turn, has no remedies at his disposal to force the defendant to perform (because the contract is void) and cannot reclaim his performance as long as the defendant intimates that he is "willing and able" to perform.¹⁹⁵ Therefore the rule blurs the distinction between an unenforceable, yet valid,

¹⁹² *Unjust Enrichment* 256. Birks also points out that some formal requirements "stand on the borderline with illegality", in which case a restitutionary claim may be barred – see 256-257 for a discussion of the purpose of these types of formal requirements and the illustrative decision in *Dimond v Lovell* [2002] 1 AC 384.

¹⁹³ Meier "Restitution after Executed Void Contracts" in *Swaps Litigation* 209. The writer comes to this conclusion after a survey of English cases on void contracts and restitutionary claims.

¹⁹⁴ This is the traditional view of the meaning of failure of consideration. After the swaps cases, failure of consideration could also mean, in the context of a void contract, the absence of a valid obligation. See 6 5 below.

¹⁹⁵ J C de Wet & A H van Wyk *De Wet & Yeats Die Suid-Afrikaanse Kontraktereg en Handelsreg* 4 ed (1978) 289; P M Wulfsohn *Formalities In Respect Of Contracts of Sale of Land Act (71 of 1969)* (1980) 245. Even if the defendant does perform, the plaintiff has no contractual remedies at his disposal if that performance is defective, precisely because the contract is void. See Visser *Unjustified Enrichment* 465; A D J Van Rensburg & S H Treisman *The Practitioner's Guide to the Alienation of Land Act* 2 ed (1984) 73.

contract and a void contract by giving some effect to the invalid agreement.¹⁹⁶ This was one of the reasons why the rule was rejected by the then Cape Provincial Division of the Supreme Court.¹⁹⁷

“It is not for the court to give effect indirectly to contracts which Parliament has decreed should be devoid of effect”.¹⁹⁸

Finally, it should be stressed that there are in fact two judgments in the *Thomas* case. Quain J held that a claim for restitution in terms of an unenforceable contract would fail as long as the defendant was willing and able to perform.¹⁹⁹ Mellor J did not refuse restitution for that reason, but focused rather on the fact that the plaintiff had paid the deposit knowing that the contract did not comply with the Statute of Frauds²⁰⁰ and further, that she had led the defendant to believe that she would abide by the contract in spite of the fact that it was formally defective.²⁰¹ In Mellor J’s judgment, the fact that the defendant remained willing and able to perform simply emphasised the unconscionable conduct of the plaintiff in seeking to escape an agreement which she knew to be formally defective, but which she nevertheless partly performed.²⁰² If Innes CJ did base the *Carlis* rule on the *Thomas* case, then it seems that he combined aspects of both judgments without considering the fact that the reasoning in each was different. He relied on the policy considerations informing Mellor J’s judgment – the notion that it is unconscionable to reclaim a performance from a contracting party who is ready and willing to perform - but disregarded the very particular facts which led to that conclusion. Simultaneously, the Chief Justice adopted the defence formulated by Quain J, but again disregarded the consequence of unenforceability which inspired that defence. The effect of the *Carlis* rule

¹⁹⁶ *Spies v Die Hofster Goudmyn Maatskappy (Eiendoms) Beperk* 1942 WLD 175 181 per Schreiner J.

¹⁹⁷ *CD Development Co (East Rand) (Pty) Ltd v Novick* 1979 4 All SA 22 (C).

¹⁹⁸ 39.

¹⁹⁹ *Thomas v Brown* (1876) 1 QB 714 723.

²⁰⁰ 721.

²⁰¹ 722.

²⁰² According to the judge,

“[t]he breaking off of the agreement was not in any sense the fault of the vendor. He was always ready and willing to complete the purchase and execute a conveyance, but the vendee chooses to set up this question about the Statute of Frauds, and to say, ‘[a]lthough I can have the contract performed if I please, I repudiate it.’ Under these circumstances, I think it would be quite monstrous if the plaintiff could recover” (722-723).

is that the “willing and able” defence is applied in the context of a formally invalid agreement (for which it was never designed) to prevent unconscionable behaviour (even in cases where no such conduct is present on the facts).

Despite these and other criticisms,²⁰³ the rule in *Carlis* was reaffirmed in an *obiter* statement in a subsequent Appellate Division decision²⁰⁴ and was consistently applied in the Transvaal.²⁰⁵ This led to some strange results. For instance, in *Mattheus v Stratford*²⁰⁶ the buyer’s enrichment claim was denied despite the fact that the defendant’s willingness and ability to perform related to a performance which was impossible to define.²⁰⁷ Again in *De Villiers NO v Summerson*,²⁰⁸ the fact that the seller pleaded that he was willing and able to perform allowed him to rely on a forfeiture clause contained within the void oral agreement.²⁰⁹

While the rule in *Carlis* was followed in the Transvaal, it was expressly rejected in the Cape in *CD Development Co (East Rand) (Pty) Ltd v Novick*²¹⁰ and also held not to be applicable to the *rei vindicatio*²¹¹ or to hire-purchase contracts.²¹² In the latter context,

²⁰³ As to which, see *CD Development Co (East Rand) (Pty) Ltd v Novick* 1979 4 All SA 22 (C) 26 ff.

²⁰⁴ *Wilken v Kohler* 1913 AD 135 145.

²⁰⁵ See eg *Kennedy and Kennedy v Lanyon* 1923 TPD 284; *Mattheus v Stratford* 1946 TPD 498; *Pucjowski v Johnston’s Executors* 1946 WLD 1; *Botes v Toti Development Co (Pty) Ltd* 1978 1 SA 205 (T).

²⁰⁶ 1946 TPD 498.

²⁰⁷ *Mattheus v Stratford* 1946 TPD 498 502. See also De Wet & Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 289 n 77; Wulfsohn *Formalities* 243; *CD Development Co (East Rand) (Pty) Ltd v Novick* 1979 4 All SA 22 (C) 32.

²⁰⁸ 1951 3 SA 75 (T).

²⁰⁹ *De Villiers NO v Summerson* 1951 3 SA 75 (T) 80G-H. See further De Wet & Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 289 n 77; Wulfsohn *Formalities* 244; *CD Development Co (East Rand) (Pty) Ltd v Novick* 1979 4 All SA 22 (C) 32. This judgment was subsequently overturned in *Vogel NO v Volkersz* 1977 1 SA 537 (T) 554D-E where Botha J held that “if a contract of sale is null and void, it is a legal impossibility to allow the seller to enforce the contract *pro tanto* by relying on a forfeiture clause contained in it in order to resist a claim by the purchaser for a refund of the purchase price paid by him pursuant thereto.”

²¹⁰ 1979 4 All SA 22 (C).

²¹¹ In *Bushney v Joliffe* 1953 4 SA 273 (W) 276C, the court held that in order for a plaintiff to succeed with the *rei vindicatio* it had to allege that the defendant was unwilling or unable to perform. This was subsequently rejected in *Akbar v Patel* 1974 4 SA 104 (T) where Trengove J held that the court in that case had failed to distinguish between an enrichment claim (where the *Carlis* rule was applicable) and a claim for a return of property in which ownership had not been transferred (108C-H). Trengove J’s conclusion was

such rejection rested on policy grounds: the purpose of the Hire Purchase Act 36 of 1942 was to protect purchasers from “unscrupulous” hire-purchase dealers, a purpose that would have been nullified if the “willing and able” defence was held to be applicable.²¹³

6 3 3 4 5 *The current South African approach: a statutory enrichment claim*

The conflict created by the *Carlis* rule, at least as it related to contracts for the sale of land, was resolved when the legislature introduced section 28 of the Alienation of Land Act, subsection 1 of which provides a statutory enrichment action where one party has performed in terms of a formally invalid contract. Section 28(1) allows the purchaser to recover from the seller his performance;²¹⁴ interest on any payments he may have made;²¹⁵ reasonable compensation for necessary expenditure incurred in connection with the preservation of the land;²¹⁶ and the cost of certain improvements to the land to which the owner or alienator expressly or tacitly consented.²¹⁷ The seller, on his part, may reclaim his performance;²¹⁸ reasonable compensation for the occupation, use and enjoyment of the land;²¹⁹ and compensation for any damage caused to the property by the

subsequently confirmed in *Patel v Adam* 1977 2 SA 653 (A) 670A-D, a case which is discussed in detail in Sonnekus *Unjustified Enrichment in SA Law* 263-264 nn 174, 176.

²¹² *Denton v Haldon's Furnishers (Pty) Ltd* 1951 1 SA 720 (A).

²¹³ 725A-B.

²¹⁴ S 28(1).

²¹⁵ S 28(1)(a)(i). At common law, the seller was not obliged to pay interest unless he was in *mora*. Wulfsohn *Formalities* 250; *Pucjowski v Johnston's Executors* 1946 WLD 1 7. In *Gibbs v Vantyi* 2010 2 SA 606 (ECP), the court appears to have lost sight of the fact that this statutory provision now replaces the common law. There, a sale of land was held to be formally invalid. The purchasers had paid a certain sum of money to an auctioneer (the sale did not fall within s 3(1) of the Act which exempts sales of land by public auction from the formal requirements prescribed by s 2(1)) which consisted of the auctioneer's commission and a deposit (608B). Although the court held that the purchasers were entitled to reimbursement of the sum, it ordered that interest on that sum be calculated from the date of demand (611H-J). However, interest on the deposit should have been calculated in terms of s 28(1)(a)(i), from the date of payment. See also Du Plessis *Law of Unjustified Enrichment* 112 n 112.

²¹⁶ S 28(1)(a)(ii)(aa).

²¹⁷ S 28(1)(a)(ii)(bb). By implication, the effect of this provision is that where the seller has not given his consent, he is entitled to keep the value of the improvement. For criticism, see Visser *Unjustified Enrichment* 466; De Vos *Verrykingsaanspreeklikheid* 196.

²¹⁸ S 28(1).

²¹⁹ S 28(1)(b)(i).

purchaser or anyone for whom he is vicariously liable.²²⁰ It is therefore unnecessary for a plaintiff to bring the claim for recovery of his performance within the parameters of one of the recognised enrichment actions. Furthermore, section 28 does away with the defence of willingness or ability to perform.

However, the *Carlis* rule has not yet been overruled by the Supreme Court of Appeal. It is also possible that the legislature may prescribe formal requirements for the validity of other categories of agreements in the future, and the question may then arise whether the *Carlis* rule should be applicable. It is suggested that the answer should be in the negative. First, the “willing and able” defence appears to be reserved for valid but unenforceable contracts in English law; it has never been applied in the context of void contracts. Secondly, recognising the “willing and able” defence to an enrichment remedy in the context of a void contract blurs the distinction between unenforceability and voidness: the plaintiff may not sue on the void contract and yet the defendant may rely on that same contract as a defence to any potential enrichment claim, simply by indicating that he is prepared to perform in terms of it. Finally, while the rule appears to be directed at unconscionable reliance on a formal defect to escape a seriously intended agreement, it can also promote fraud. The defendant need merely allege that he is willing and able to perform, but there is no remedy available to the plaintiff should the defendant have made that allegation dishonestly.²²¹ It is therefore entirely possible that the defendant may allege that he is willing and able to perform as a dilatory tactic, while he searches for a better bargain elsewhere. Should he find that better bargain and transfer the land to a third party, the plaintiff cannot prevent him from doing so, because there is no valid contract upon which to sue. For these reasons, it is suggested that the rule should be abandoned in its entirety.

While the *Carlis* rule itself is suspect, the policy consideration underlying its imposition merits further attention. It was stated above that the rule is directed at preventing a party from relying on formal invalidity to escape an agreement which was seriously intended. In South African law, this was taken into account when determining whether a party should be awarded an enrichment remedy; in other jurisdictions, this policy consideration informs

²²⁰ S 28(1)(b)(ii).

²²¹ See E Kahn *Contract and Mercantile Law through the Cases* (1971) 192–193; *CD Development Co (East Rand) (Pty) Ltd v Novick* 1979 4 All SA 22 (C) 36.

the award of certain remedies which lead to the enforcement, direct or indirect, of a formally defective contract. It is these remedies which serve as the focus of the next section.

6 4 Remedies that lead to the direct or indirect enforcement of a formally defective contract

6 4 1 Introduction

The preceding sections have shown that the consequences of non-compliance with statutory formalities vary according to the type of contract, the policy considerations underlying the particular formal requirement and the jurisdiction in question.²²² We have also seen that a claim for restitution based on unjustified enrichment may be available to a party who has performed in terms of a formally defective contract, irrespective of whether the consequence of non-compliance is invalidity or unenforceability.²²³ The function of such a claim is “to restore economic benefits to the plaintiff, at whose expense they were obtained, and for the retention of which by the defendant there is no legal justification”.²²⁴

However, there are circumstances in which an enrichment claim is thought to provide inadequate relief, so that a court may award a remedy which recognises a party’s reliance or expectation interest, even where formal requirements dictate that the contract is void or unenforceable due to non-compliance. Thus, we find the doctrine of part performance and the use of estoppel in some common-law jurisdictions;²²⁵ in Germany, the courts may award a remedy on the basis of paragraph 242 BGB, or in terms of the doctrine of *culpa in contrahendo*.²²⁶ South African law is more restrictive than both its civilian and common-law counterparts in this regard and does not currently appear to award a remedy which could lead to the enforcement of the contract, at least not in the absence of third-party involvement. These alternative approaches will now be discussed, in order to determine whether they are in any sense useful and usable within the South African context. For this

²²² See 6 2.

²²³ See 6 3 3.

²²⁴ Visser *Unjustified Enrichment* 4.

²²⁵ See 6 4 2 and 6 4 4 below.

²²⁶ 6 4 3.

reason, what follows does not commence with an exposition of current South African law – the strictness of its approach to remedies in the context of statutory formalities only becomes clearer once the more liberal English and German approaches have been illustrated.

6 4 2 The doctrine of part performance

The doctrine of part performance reflects one of the earliest confrontations with the problems created by statutory formalities.²²⁷ In a previous chapter, it was stated that the Statute of Frauds was a legislative reaction to the procedural deficiencies in the law of evidence in seventeenth-century England.²²⁸ Nevertheless,

“[i]t quickly became evident that if the seventeenth century solution addressed one mischief it was capable of giving rise to another: that a party, making and acting on what was thought to be a binding oral agreement, would find his commercial expectations defeated when the time for enforcement came and the other party successfully relied on the lack of a written memorandum or note of the agreement.”²²⁹

The doctrine of part performance was a creation of the English courts of equity as a response to the second “mischief” described above.²³⁰ The remedy was traditionally only applied in the context of the sale of land, although there were *dicta* which suggested that it might also be applicable in the context of other formally defective agreements rendered unenforceable by the Statute of Frauds.²³¹ The question is now irrelevant in English law, because the Statute no longer applies to any of the contracts falling within its original

²²⁷ Simpson *Common Law of Contract* 614. The Statute of Frauds was promulgated in 1677; the earliest authority on the doctrine of part performance is *Butcher v Stapely* 23 ER 524 (1685). Estoppel became part of the English common law in the first half of the nineteenth century. See E Cooke *The Modern Law of Estoppel* (2000) 16 ff.

²²⁸ See ch 2 (2 2).

²²⁹ *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* [2003] UKHL 17 paras 2-3 per Lord Bingham. See also English Law Commission *Formalities for Contracts for Sale etc of Land (Working Paper No 92)* (1985) para 2.4.

²³⁰ H Burn & J Cartwright *Cheshire and Burn's Modern Law of Real Property* 18 ed (2011) 964; *Steadman v Steadman* [1976] AC 536 540, 545.

²³¹ See eg *McManus v Cooke* (1887) LR 35 Ch D 681 697; *Britain v Rossiter* (1882-83) LR 11 QBD 123 133 per Thesiger LJ. See also Whittaker “Form” in *Chitty on Contracts* 1 399.

scope except those of guarantee²³² and an order of specific performance of a guarantee does not fall within the ambit of equity jurisdiction.²³³ Insofar as the doctrine applied to land transactions, it was codified in English law by the Law of Property Act of 1925.²³⁴ Although it was subsequently abolished by the Law of Property (Miscellaneous Provisions) Act, it still exists in other common-law jurisdictions, like Canada and Australia.

According to the doctrine, a claimant who has partly performed an oral contract required to be evidenced in writing may claim specific performance of that contract when the defendant has allowed the claimant to alter his position in the belief that the former would also perform his part of the agreement.²³⁵ Its existence is based on two interrelated reasons. The first is that the doctrine is directed towards solving the problem highlighted throughout this thesis, namely that statutory formalities can become a refuge for a party who seeks to deny the existence of an (otherwise valid) oral contract, despite having allowed the other contracting party to act on the assumption that such a contract exists. Thus, in *Steadman v Steadman*²³⁶ (“*Steadman*”) it was stated that

“[i]f one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn round and assert that the agreement is unenforceable. Using fraud in its other and less precise sense, that would be fraudulent on his part and it has become proverbial that courts of equity will not permit the statute to be made an instrument of fraud.”²³⁷

In other words, the doctrine of part performance is a kind of estoppel.²³⁸

The second reason is that the act or acts of part performance by the plaintiff can prove the existence of the agreement itself, and therefore serve as a substitute for the memorandum

²³² See ch 2 (2 2).

²³³ Von Mehren “Formal Requirements” in *Int Enc Comp L VII* 124; E Peel *Treitel’s The Law of Contract* 13 ed (2011) 198.

²³⁴ See s 40(2), provided in Addendum A.

²³⁵ Whittaker “Form” in *Chitty on Contracts* 1 399.

²³⁶ [1976] AC 536.

²³⁷ *Steadman v Steadman* [1976] AC 536 540. See also Burn & Cartwright *Law of Property* 963-964.

²³⁸ *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* [2003] UKHL 17 para 22 per Lord Hoffmann; Burn & Cartwright *Law of Property* 973.

or note required by the relevant legislation.²³⁹ In the *Steadman* case, the court gave priority to the fraud-prevention purpose of the doctrine. There, the parties had divorced and had orally agreed that Mrs Steadman would surrender her interest in the jointly-owned matrimonial home, in exchange for which Mr Steadman would pay her £1 500, and £100 in settlement of arrear maintenance. The £100 was paid, but Mrs Steadman refused to execute the deed of transfer, because she was of the opinion that the former sum was less than what she ought to have been offered.²⁴⁰ Mr Steadman then sought to enforce the oral contract on the grounds of part performance.

In giving effect to the notion that the primary purpose of the doctrine of part performance was to prevent fraud (rather than to give effect to conduct which served as an evidentiary substitute for a written document), the court relaxed the requirement that the act(s) of part performance must point unequivocally to the precise terms of the alleged oral contract. It was sufficient if the claimant could show that his conduct indicated the existence of a contract and that his acts were consistent with that contract.²⁴¹ The court was divided on the question whether the part performance must relate to a contract of land or whether it was enough simply that the claimant's conduct constituted proof that a contract was concluded.²⁴² Finally, the court seemed to be of the opinion that the payment of money was a relevant act of part performance in the circumstances.²⁴³ However, acts done in

²³⁹ *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* [2003] UKHL 17 para 23 per Lord Hoffmann; Von Mehren "Formal Requirements" in *Int Enc Comp L VII* 124.

²⁴⁰ *Steadman v Steadman* [1976] AC 536 539.

²⁴¹ *Steadman v Steadman* [1976] AC 536 541-542 (per Lord Reid); 546 (per Lord Morris of Borth-Y-Gest); 553, 562-563 (per Viscount Dilhorne); 566 (per Lord Simon of Glaisdale); 570 (per Lord Salmon). See also Whittaker "Form" in *Chitty on Contracts 1* 399-400; Burn & Cartwright *Law of Property* 965. In other common-law jurisdictions where the doctrine is still applicable, the requirements are set more strictly and the acts of part performance must unequivocally point to the alleged oral contract. See eg *McMahon v Ambrose* [1987] VR 817 (Aus); *Khoury v Khouri* [2006] NSWCA 184 (Aus); *Lighting By Design (Aust) Pty Ltd v Cannington Nominees Pty Ltd* [2008] WASCA 23 (Aus); *Sheetharbour Offshore Development Inc v Tusket Mining Inc* 2005 NSSC 307 (Can); *Sadaka v Saleh* 2011 SKQB 416 (Can); *Varma v Donaldson* 2008 ABQB 106 (Can).

²⁴² *Steadman v Steadman* [1976] AC 536: two Law Lords thought it was unnecessary (Lord Reid (541), Viscount Dilhorne (554)); two thought it was necessary (Lord Morris of Borth-Y-Gest (547), Lord Salmon (567-568)); and one avoided the issue (Lord Simon of Glaisdale (563)).

²⁴³ *Steadman v Steadman* [1976] AC 536 541 (per Lord Reid), 565 (per Lord Simon of Glaisdale), 570-571 (per Lord Salmon). Until this case, the payment of money was never thought to be sufficient, because such

contemplation of a contract are insufficient;²⁴⁴ what appears to be required is the performance of an obligation or the exercise of a right in terms of the oral contract.²⁴⁵

A successful reliance on the doctrine results in the admission of evidence relating to all the terms of the contract and not only the terms proved by the act of part performance.²⁴⁶ Since the remedy awarded is specific performance (or damages in lieu thereof²⁴⁷), it is difficult to accept that the doctrine does not enforce the oral contract.²⁴⁸ Nevertheless, it has been said that

“in a suit founded on such part performance, the defendant is really ‘charged’ upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow ... The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded. The choice is between undoing what has been done (which is not always possible or, if possible, just) and completing what has been left undone ... It is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities”.²⁴⁹

Therefore, the doctrine of part performance, while arguably subversive of the prescribed formal requirement, does represent an attempt to prevent that formal requirement from becoming an instrument of fraud.

an action has no obvious link to any contract – see Whittaker “Form” in *Chitty on Contracts* 1 402; *Maddison v Alderson* (1883) 8 App Cas 467 479.

²⁴⁴ Eg having the land surveyed or valued. Whittaker “Form” in *Chitty on Contracts* 1 401; C Davis “Estoppel: An Adequate Substitute for Part Performance?” (1993) 13 *OJLS* 99 101; Burn & Cartwright *Law of Property* 965 n 102 provide further examples of acts which have not qualified as part performance.

²⁴⁵ Eg taking possession of the land or the payment of money in certain circumstances. Whittaker “Form” in *Chitty on Contracts* 1 401; Davis 1993 *OJLS* 101.

²⁴⁶ Whittaker “Form” in *Chitty on Contracts* 1 402.

²⁴⁷ Whittaker “Form” in *Chitty on Contracts* 1 399; Burn & Cartwright *Law of Property* 965-966.

²⁴⁸ Davis 1993 *OJLS* 102.

²⁴⁹ *Maddison v Alderson* (1883) 8 App Cas 467 475-476.

The doctrine of part performance can only be applied, as a matter of logic, where a valid oral agreement is recognised separately from the recorded agreement. It cannot apply where formalities are thought to be constitutive, since there cannot be performance of a non-existent contract.²⁵⁰ For this reason, the doctrine has been held not to be applicable in the South African context.²⁵¹

This conclusion was drawn early in the 20th century, in *Jolly v Herman's Executors*.²⁵² The plaintiff contended that the doctrine was applicable in spite of the fact that the contract between itself and the defendants was formally invalid. The court responded as follows:

“[T]he plaintiff's contention cannot be upheld unless this Court is able and willing to apply to contracts under the [Volksraad Besluit No 1422 of 12 August 1886] a doctrine similar to that applied by English equity courts to certain contracts falling within the Statute of Frauds. By a long series of decisions it has been established that such contracts, even though verbal, will be enforced at equity if they have been part performed by the party suing on them ... [These] cases ... were all decided on the basis that that statute, while barring any legal remedy upon certain parol agreements, did not render the agreement itself null ... But where, as in the present case, the legislature has declared that contracts not complying with certain formalities shall be void *ab initio*, those formalities cannot be dispensed with; and no court can, without doing an illegality, pronounce that such contracts are not void.”²⁵³

Therefore, when an agreement is void, the doctrine of part performance is unavailable. This conclusion was reiterated in the subsequent *Wilken* case,²⁵⁴ and it is also the reason why the English Law Commission recommended that the doctrine of part performance would not be applicable under the Law of Property (Miscellaneous Provisions) Act which provides that formally defective sales of land are void.²⁵⁵

The Law Commission's recommendation was motivated to a large extent by the uncertainty created by the *Steadman* case in determining which acts were sufficient for the

²⁵⁰ See *Britain v Rossiter* (1879) 11 QBD 123 130; *Maddison v Alderson* (1883) 8 App Cas 467 474-475; *Yaxley v Gotts* [2000] Ch 162 172.

²⁵¹ *Jolly v Herman's Executors* 1903 TS 515; *Wilken v Kohler* 1913 AD 135.

²⁵² 1903 TS 515.

²⁵³ 522-523.

²⁵⁴ *Wilken v Kohler* 1913 AD 135 143-144.

²⁵⁵ *Formalities for Contracts for Sale etc of Land (Law Com No 164)* (1987) para 4.13.

doctrine to be applicable and whether these acts must go to prove a contract relating to land.²⁵⁶ Furthermore, the Commission was of the opinion that the doctrine of part performance was “a blunt instrument for doing justice”.²⁵⁷ However, it did acknowledge that there could be instances where the inability to rely on the doctrine might lead to harsh consequences for the plaintiff.²⁵⁸ The Commission therefore suggested that other equitable remedies, like estoppel, should be retained in order to prevent injustice. Estoppel is discussed in greater detail below.²⁵⁹ The focus of the next section is the German approach to the provision of remedies which could lead to the enforcement of a formally defective contract.

6 4 3 Paragraph 242 BGB and the doctrine of *culpa in contrahendo*

In German law, where non-compliance with formalities results in invalidity, as it does in South Africa, it nevertheless appears that there is some recognition that circumstances may exist which would render it inequitable for a party to rely on a formal defect to escape the consequences of an agreement which was seriously intended. In these situations, there are two possible remedies available to a party, the bases of which are found in paragraph 242 BGB (which stipulates that a party has a duty to act in good faith) and in the doctrine of *culpa in contrahendo* respectively.

A remedy in terms of paragraph 242 BGB for non-compliance with formalities is only provided in exceptional circumstances, and on a case-by-case basis.²⁶⁰ A particularly illustrative case is colloquially known as *Edelmann II*.²⁶¹ The plaintiff had bought a plot of land from the defendant in terms of a written agreement which was not notarised, but which bore the signature of the defendant’s managing director (who had also been the plaintiff’s boss at an earlier time). When the plaintiff requested that the written agreement be notarially authenticated, the managing director responded that it was his “habit to honour his obligations no matter whether they were made orally, in writing, or were in

²⁵⁶ Para 1.9.

²⁵⁷ Para 1.9.

²⁵⁸ Para 5.4.

²⁵⁹ See 6 4 4.

²⁶⁰ Von Mehren “Formal Requirements” in *Int Enc Comp L VII* 129.

²⁶¹ BGHZ 48, 396 (21-06-1967). The case is discussed and quoted in Markesinis et al *German Law of Contract* 85-86, and a translation of the case by K Lipstein can be found in the same source, 593-594.

notarial form.”²⁶² When the plaintiff continued to insist that the agreement should comply with the formal requirements, the managing director replied by stating that he had signed on behalf of the defendant company, and that the contract was as good as a notarial act.²⁶³

According to the court, the previous employment relationship between the plaintiff and the managing director meant that the latter “was in his eyes endowed with special authority”²⁶⁴ which made it virtually impossible for him to insist that the agreement should be notarially authenticated. Furthermore,

“the defendant announced in such an emphatic manner his intention to perform the contract, which was invalid in form, by pledging his status and reputation and by referring to his business practice that he cannot resile free from contract without offending against good faith. Reliance subsequently on the formal invalidity of the contract, constitutes an [inadmissible] exercise of his right, irrespective of the fact that the plaintiff was not in error as to the formal requirements.”²⁶⁵

The court enforced the formally invalid contract, because the failure to do so would have led to a “totally unbearable” (*schlechthin untragbar*) result.²⁶⁶

Therefore, before granting a remedy in terms of paragraph 242 BGB, a court will weigh up the following factors: knowledge on the part of the defendant that the contract was formally defective; the lack of such knowledge at the time of contracting on the part of the plaintiff (although *Edelmann II* indicates that this is not decisive); detrimental reliance by the plaintiff; and the adequacy of relief provided by enrichment remedies or in terms of the doctrine of *culpa in contrahendo*.²⁶⁷ The latter remedies are regarded as inadequate when they are incapable of alleviating a “totally unbearable” situation. Such a situation arises in primarily two types of cases: where the (economic) existence of the innocent party would “be destroyed or substantially endangered” by not giving effect to the contract,²⁶⁸ or where

²⁶² Markesinis et al *German Law of Contract* 85.

²⁶³ 85.

²⁶⁴ 593 (tr K Lipstein).

²⁶⁵ 594.

²⁶⁶ 594.

²⁶⁷ Von Mehren “Formal Requirements” in *Int Enc Comp L VII* 129-131.

²⁶⁸ R Zimmermann & D A Verse “Case 4: Formalities I (Germany)” in R Zimmermann & S Whittaker (eds) *Good Faith in European Contract Law* (2000) 258 259.

the guilty party has displayed a particularly serious breach of good faith by relying on the formal defect (which is usually found to exist where that party prevents the other from complying with a formal requirement and thereafter invokes the defect).²⁶⁹ If the plaintiff is successful in proving these requirements, specific performance will be awarded.²⁷⁰

In terms of the *culpa in contrahendo* doctrine, parties incur a duty of care towards each other during the negotiation phase. In the case of non-compliance with statutory formalities, relief is granted where one party knew or should have known of the formal requirement, while the other didn't and was also not under a duty to inquire further.²⁷¹ The relief granted in terms of this doctrine does not consist of specific performance but of reliance damages, because the former would amount to "performance of the contract and not the giving of damages ... and thus amount to a setting aside of the ... formal provision".²⁷² However, at least in one case, damages were measured according to what the party would have received had the contract been validly concluded.²⁷³ In effect, the remedy indirectly enforced the invalid contract.

The doctrine of part performance and the remedies available in German law all share a common element: the notion that in certain circumstances it would be inequitable to allow a party to rely on formal defectiveness where the other party has reasonably acted on the assumption that the contract is valid and enforceable. The need to do particular justice on the facts outweighs the policy considerations informing statutory formalities, with the result that the contractual expectation is enforced, either through specific performance or damages in lieu thereof. In such a case, the outcome of strict insistence on formal

²⁶⁹ Zimmermann & Verse "Case 4" in *Good Faith in European Contract Law* 259. See also R Zimmermann & D A Verse "Case 5: Formalities II (Germany)" in R Zimmermann & S Whittaker (eds) *Good Faith in European Contract Law* (2000) 281; S Lorenz & W Vogelsang "Case 11: A Contract for the Sale of a House Which Fails for Lack of Formality (Germany)" in J Cartwright & M Hesselink (eds) *Precontractual Liability in European Private Law* (2008) 311 318; Kanzleiter "§ 311b" in *Münchener Kommentar* 2 n 72.

²⁷⁰ See also BGH NJW 1972, 1189 in Markesinis et al *German Law of Contract* 595-597 (tr I Snook).

²⁷¹ Von Mehren "Formal Requirements" in *Int Enc Comp L VII* 131; S Lorenz & W Vogelsang "Case 11" in *Precontractual Liability* 319. See also RGZ 117, 121 (21-05-1927) in Markesinis et al *German Law of Contract* 595-597 (tr K Lipstein), although the plaintiff was not successful on the facts.

²⁷² BGH NJW 1965, 812 814; BGH ZIP 1988, 89 90 cited in Von Mehren "Formal Requirements" in *Int Enc Comp L VII* 132.

²⁷³ BGH NJW 1965, 814.

requirements would be “unconscionable” or it would be ‘inequitable’ to allow the other party to go back on his promise”.²⁷⁴

The last remedy, estoppel, is the topic of the following section. It will become apparent that the same equitable considerations which underlie the remedies discussed thus far also inform the English courts’ approach to the use of estoppel in the context of formalities. In South African law, estoppel in this context is more problematic.

6 4 4 Estoppel

6 4 4 1 Introduction

Estoppel operates to prevent one party (the representor) from denying the truth of a representation made by him where the other party (the representee) has acted on that representation to his detriment.²⁷⁵ In South African law, a successful defence of estoppel must therefore show that there has been a representation by the representor; detriment on the part of the representee; and a causal relationship between the representation and the detriment.²⁷⁶ It is also stated as a general rule, that a successful reliance on the defence should not result in the enforcement of an agreement which is prohibited by law.²⁷⁷ This rule applies to agreements which are invalid, *inter alia* because they are illegal, *ultra vires* or formally defective.²⁷⁸ As Steyn CJ put it in *Trust Bank van Afrika Bpk v Eksteen*.²⁷⁹

“Dit is ‘n erkende beginsel van ons reg dat wat by direkte optrede in stryd met ‘n wetlike voorskrif van nul en gener waarde sou wees, nie deur indirekte optrede geldig gemaak kan

²⁷⁴ Markesinis et al *German Law of Contract* 86.

²⁷⁵ J C Sonnekus *Rabie and Sonnekus The Law of Estoppel in South Africa* 2 ed (2000) 2; PJ Visser & J M Potgieter *Estoppel: Cases and Materials* (1994) v.

²⁷⁶ Fault, in the form of negligence, may also be a requirement in certain cases. See Sonnekus *The Law of Estoppel* 133 ff.

²⁷⁷ See eg *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 3 SA 1 (SCA) para 13; *Nyandeni Local Municipality v Hlazo* 2010 4 SA 261 (SCA) para 49; Sonnekus *The Law of Estoppel* 167-168; Visser & Potgieter *Estoppel* 307; Van der Merwe et al *Contract* 29.

²⁷⁸ Sonnekus *The Law of Estoppel* 170 ff. For the application of the rule in the context of agreements subject to formalities, see eg *Oceanair (Natal) (Pty) Ltd v Sher* 1980 1 SA 317 (D); *Fuls v Leslie Chrome (Pty) Ltd* 1962 4 SA 784 (W); *PhilMatt (Pty) Ltd v Mosselbank Developments CC* 1996 2 SA 15 (A).

²⁷⁹ 1964 3 SA 402 (A).

word nie. So 'n voorskrif wat teen 'n bepaalde transaksie gerig is, tref ook enige optrede wat die voorskrif sou verydel.”²⁸⁰

From a South African perspective therefore, the English Law Commission's suggestion that estoppel could be used in certain instances despite the fact that a sale of land was void for failure to comply with formalities prescribed by the Law of Property (Miscellaneous Provisions) Act is somewhat surprising.²⁸¹ The next section will examine how estoppel is applied in the context of statutory formalities in English law, before considering whether there are any exceptions to the general rule in South African law.

6 4 4 2 *Estoppel and statutory formalities in English law*

English law also recognises, as a point of departure, the general rule that estoppel may not be used to circumvent the provisions of a statute.²⁸² However, English courts are more willing than their South African counterparts to recognise that there are exceptions to the rule, even in the context of formalities. This may be ascribed to the awareness that there are statutes which, “though declaring transactions to be unenforceable or void, are nevertheless not essentially prohibitory and so do not preclude estoppels”.²⁸³ An examination is required of the statutory provision, its purpose and the social policy behind it, before deciding whether estoppel will be successful.²⁸⁴

²⁸⁰ *Trust Bank van Afrika Bpk v Eksteen* 1964 3 SA 402 (A) 411H. See also *H N R Properties CC v Standard Bank of SA Ltd* 2004 4 SA 471 (SCA) para 21.

²⁸¹ See 6 4 2 above.

²⁸² *Kok Hoong v Leong Chong Kweng Mines Ltd* [1964] AC 993 1015 per Viscount Radcliffe; E Cooke & J James (eds) “Estoppel” in C Marsh (gen ed) *Halsbury's Laws of England* 16(2) 4 ed (2003) para 960. In fact, the principle seems to have been incorporated in South African law partly on the basis that it was also applicable in English law. In *Merriman v Williams* (1880) F 135 173-174, De Villiers CJ stated that

“[n]either by the English, nor I presume by the Scotch law would the doctrine of estoppel apply so as to prevent a defendant from denying that the acts which are supposed to operate as an estoppel are contrary to or inconsistent with the provisions of the law.”

²⁸³ *Kok Hoong v Leong Chong Kweng Mines Ltd* [1964] AC 993 1015 per Viscount Radcliffe. More than one type of estoppel is recognised in common-law jurisdictions, hence the reference to “estoppels”.

²⁸⁴ *Kok Hoong v Leong Chong Kweng Mines Ltd* [1964] AC 993 1015; *Yaxley v Gotts* [2000] Ch 162 182, 191; *Shah v Shah* [2002] QB 35 44; Cooke *Estoppel* 136.

Such an examination occurred in *Actionstrength Ltd v International Glass Engineering IN.GL.EN. SpA*²⁸⁵ (“*Actionstrength*”). *Actionstrength*, a sub-contractor, had not been paid by the general contractor and threatened the owner of the site (St-Gobain) with rescission of the contract and withdrawal of its labour. A representative of the owner promised *Actionstrength* that if St-Gobain could not persuade the general contractor to meet its obligations, it would itself pay the appellant. Relying on this promise, *Actionstrength* continued to provide labour. The general contractor failed to pay and then St-Gobain also refused to pay.²⁸⁶

Because the contract between *Actionstrength* and St-Gobain was a contract of guarantee, it was unenforceable because it had not been reduced to writing. In determining whether *Actionstrength* could successfully estop St-Gobain from relying on the defence provided by the Statute of Frauds, Lord Hoffmann stated that the purpose of the Statute was the following:

“The terms of the statute ... show that Parliament, although obviously conscious that it would allow some people to break their promises, thought that this injustice was outweighed by the need to protect people from being held liable on the basis of oral utterances which were ill-considered, ambiguous or completely fictitious.”²⁸⁷

However, these policy concerns were insufficient in themselves to prevent estoppel from being applicable. The purpose of the Statute of Frauds is not to protect particularly vulnerable classes of people, whose weaknesses may be exploited in the absence of some kind of statutory protection.²⁸⁸ Allowing estoppel to succeed in the latter case would render that protective purpose nugatory. By contrast, the provisions of the Statute of Frauds are intended to prevent the imposition of liability based on “oral utterances” which were never made or ill-considered. These policy considerations do not justify the automatic exclusion of estoppel. This is an important point, because it emphasises that

²⁸⁵ [2003] UKHL 17.

²⁸⁶ Paras 38-41.

²⁸⁷ Para 20.

²⁸⁸ See *Actionstrength Ltd v International Glass Engineering IN.GL.EN. SpA* [2003] UKHL 17 para 49 in which Lord Walker of Gestingthorpe refers to persons dealing with moneylenders or certain kinds of tenants as typical classes of vulnerable people worthy of protection. See also Cooke *Estoppel* 143.

statutory formalities can be imposed for different reasons, not all of which dictate that estoppel should be unsuccessful as a matter of course.

The real reason why estoppel was unsuccessful in *Actionstrength* was because no representation, beyond the oral agreement concluded with St-Gobain, had been made to induce or encourage Actionstrength to believe that it was the recipient of an effective guarantee. It was not enough that the creditor acted on the assurance given by the purported guarantor, since this is the case with every guarantee.²⁸⁹ To admit an estoppel on this representation alone would, in effect, amount to repealing the Statute.²⁹⁰ While Lord Hoffman declined to consider whether estoppel could ever succeed in the context of formally defective guarantees, three judges did suggest that it might, where there was an “extra ingredient” such as a representation that the guarantor would honour the agreement despite the absence of writing, or that it was not a contract of guarantee, or that the agreement would be confirmed in writing.²⁹¹ In other words, the representation must consist of something more than the mere conclusion of an oral guarantee. Because this “extra ingredient” was not present on the facts of this case, Actionstrength could not recover the £1.3 million due to it.

Estoppel has also been considered in the context of formally defective sales of land. The particular form of estoppel applied in this context is proprietary estoppel, which is

“applicable where some action is taken by a person ... in reliance on a mistaken belief as to his rights in or over land, or in reliance on expectations relating to land, where the landowner stands by or encourages the action in such circumstances that it would be unconscionable for him later to seek to enforce his strict legal rights.”²⁹²

At the outset, it should be noted that there is some overlap between the doctrine of part performance and proprietary estoppel:

“At a high level of generality, there is much common ground between the doctrines of proprietary estoppel and the constructive trust, just as there is between proprietary estoppel and

²⁸⁹ *Actionstrength Ltd v International Glass Engineering IN.GL.EN. SpA* [2003] UKHL 17 para 25.

²⁹⁰ Para 26.

²⁹¹ Para 9 per Lord Bingham, para 35 per Lord Clyde, and para 50 per Lord Walker.

²⁹² Davis 1993 *OJLS* 101.

part performance. All are concerned with equity's intervention to provide relief against unconscionable conduct".²⁹³

It has also been stated above that the doctrine of part performance is regarded as a form of estoppel.²⁹⁴ Nevertheless, there are some differences between them. The doctrine of part performance requires that the plaintiff's conduct must point to the existence of an agreement between the parties. This is not a requirement of proprietary estoppel, where it is sufficient that the claimant has acted in reliance on the representations of the defendant; the existence of an agreement is irrelevant.²⁹⁵ Furthermore, a successful claim based on part performance results in the award of specific performance or damages in lieu thereof; if a court should not award specific performance, the claimant has no remedy.²⁹⁶ Proprietary estoppel is more flexible, and a court has a wide range of remedies at its disposal, including the granting of a proprietary right.²⁹⁷ Finally, while the doctrine of part performance may be available to both parties, it appears that proprietary estoppel may only be raised by the purchaser of land;²⁹⁸ the seller must be content with other forms of estoppel or other remedies.²⁹⁹

As already discussed,³⁰⁰ the English Law Commission believed that its recommendation - non-compliance with formal requirements should result in the invalidity of a transaction relating to land - would render the doctrine of part performance obsolete. Nevertheless, it believed that other equitable remedies, like estoppel, would still be available in cases of potential injustice. Despite this confident assertion, the Law of Property (Miscellaneous Provisions) Act does not refer to estoppel; instead, section 2(5) simply states that "nothing in [section 2] affects the creation or operation of resulting, implied or constructive trusts."

²⁹³ *Yaxley v Gotts* [2000] Ch 162 176.

²⁹⁴ See 6 4 2.

²⁹⁵ Davis 1993 OJLS 110.

²⁹⁶ 102

²⁹⁷ Davis 1993 OJLS 101 113, 115. In other words, proprietary estoppel can be a cause of action (see Cooke *Estoppel* 127 ff). Although it has been said that estoppel cannot be used in this way in South African law (see eg Sonnekus *The Law of Estoppel* 197 ff), this rule was criticised as formalistic by Harms DP in *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC* 2011 2 SA 508 (SCA) para 31.

²⁹⁸ Davis 1993 OJLS 103,105.

²⁹⁹ 117 ff.

³⁰⁰ See 6 4 2.

This has created uncertainty as to the exact role which estoppel may play in the context of transactions relating to land. For example, in *Godden v Merthyr Tydfil Housing Association*³⁰¹ it was held that a party suing for damages for breach of contract may not raise estoppel to preclude the defendant from relying on the invalidity of an oral sale of land to proceed with such a claim, because it would be contrary to the provisions of the Law of Property (Miscellaneous Provisions) Act.³⁰² Succeeding with estoppel in these circumstances would amount to enforcing a void transaction and result in exactly the kind of dispute that the requirement of writing, which promotes certainty, seeks to avoid.³⁰³

However, in *McCausland v Duncan Lawrie Ltd*,³⁰⁴ the *obiter* statement was made by Morritt LJ that

“[s]ection 2 of the Act of 1989 does not give rise to any illegality if its terms are not observed and the need for an estoppel arises in just those circumstances where there is no enforceable contract. For my part I would not place weight on the contention that an estoppel ... is impossible as a matter of law but it still has to be made out as a matter of fact.”³⁰⁵

A case where estoppel could have succeeded as a matter of law and fact is *Yaxley v Gotts*³⁰⁶ (“*Yaxley*”). Yaxley and Gotts concluded an oral agreement in terms of which the appellant undertook to make certain improvements to, and manage, a block of flats in return for which he would acquire ownership of the ground floor. This agreement was never reduced to writing, although the respondent did indicate that he would do so at a later stage (the “extra ingredient”). Ownership in the ground floor was never transferred. On appeal, the respondent argued that the appellant was not entitled to estop him from relying on the formal invalidity of the oral agreement, but should rather have instituted a claim for restitution of the value of the work and services he had rendered.³⁰⁷

However, Robert Walker LJ had

³⁰¹ (1997) 74 P & CR D1.

³⁰² D3.

³⁰³ D3.

³⁰⁴ [1997] 1 WLR 38.

³⁰⁵ 50.

³⁰⁶ [2000] Ch 162.

³⁰⁷ 170.

“no hesitation in agreeing ... that the doctrine of estoppel may operate to modify (and sometimes perhaps even to counteract) the effect of section 2 of the [Law of Property (Miscellaneous Provisions)] Act ... The circumstances in which section 2 has to be complied with are so various, and the scope of the doctrine of estoppel is so flexible, that any general assertion that section 2 is a ‘no-go area’ would be unsustainable.”³⁰⁸

At the same time, the judge stressed the need to take into account the policy considerations underlying the imposition of formalities.³⁰⁹ As in the *Actionstrength* case where formalities relating to guarantees were considered, the formal requirements imposed on land transactions did not have as their purpose the protection of particularly vulnerable categories of persons:

“Parliament's requirement that any contract for the disposition of an interest in land must be made in a particular documentary form, and will otherwise be void, does not have such an obviously social aim as statutory provisions relating to contracts by or with moneylenders, infants, or protected tenants. Nevertheless it can be seen as embodying Parliament's conclusion, in the general public interest, that the need for certainty as to the formation of contracts of this type must in general outweigh the disappointment of those who make informal bargains in ignorance of the statutory requirement. If an estoppel would have the effect of enforcing a void contract and subverting Parliament's purpose it may have to yield to the statutory law which confronts it, except so far as the statute's saving for a constructive trust provides a means of reconciliation of the apparent conflict.”³¹⁰

According to Robert Walker LJ, such reconciliation was possible where the facts met the requirements of both proprietary estoppel and a constructive trust, as they did in this case.³¹¹ As the judge noted, where there is an agreement or some understanding

³⁰⁸ 174.

³⁰⁹ 174-175.

³¹⁰ 175.

³¹¹ A constructive trust is defined as follows in *Gissing v Gissing* [1971] AC 886 905:

“A ... constructive trust ... is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.”

between the parties upon which the claimant has acted, then there is in effect no difference between the two remedies. In both cases,

“[e]quity enforces [the oral agreement] because it would be unconscionable for the other party to disregard the claimant’s rights”.³¹²

Beldam LJ went still further, by stating that it was possible that estoppel could succeed even where it did not overlap with a constructive trust:

“I cannot see that there is any reason to qualify the plain words of section 2(5). They were included to preserve ... equitable remedies. I do not think it inherent in a social policy of simplifying conveyancing by requiring the certainty of a written document that unconscionable conduct or ... fraud should be allowed to prevail ... [T]he provision that nothing in section 2 of the Act of 1989 is to affect the creation or operation of resulting, implied or constructive trusts effectively excludes from the operation of the section cases in which an interest in land might equally well be claimed by relying on constructive trust or proprietary estoppel.”³¹³

Although Beldam LJ’s judgment creates the impression that estoppel will succeed even when the facts do not also give rise to a constructive trust, this matter is not yet settled in English law. For example, in *Cobbe v Yeoman’s Row Management Ltd*,³¹⁴ Lord Scott of Foscote made the *obiter* remark that proprietary estoppel could not succeed on its own, because “[e]quity can surely not contradict [a] statute”³¹⁵ which provides that an oral

Because the vehicle of a constructive trust has been specifically rejected in South African law (see *Kerbyn 178 (Pty) Ltd v Van den Heever and Others* NNO 2000 4 SA 804 (W) 817 D-F; E Cameron “Constructive Trusts in South African Law: The Legacy Refused” (1999) 3 *Edin LR* 341), it is not discussed in detail in the main text.

³¹² *Yaxley v Gotts* [2000] Ch 162 180.

³¹³ 193.

³¹⁴ [2008] 1 WLR 1752.

³¹⁵ *Cobbe v Yeoman’s Row Management Ltd* [2008] 1 WLR 1752 para 29. Neuberger LJ also assumed that proprietary estoppel would not succeed if the facts did not also give rise to a constructive trust in *Kinane v Mackie-Conteh* 2005 WL 62273. Discussion (and criticism) of the notion that proprietary estoppel must overlap with a constructive trust before it can succeed in the context of formally defective sales of land can be found in B McFarlane “Proprietary Estoppel and Failed Contractual Negotiations” 2005 *Conv* 501; G Owen & O Rees “Section 2(5) of the Law of Property (Miscellaneous Provisions) Act of 1989: A Misconceived Approach?” 2011 *Conv* 495; Burn & Cartwright *Law of Property* 973-978.

agreement for the sale of land is void. However, in *Whittaker v Kinnear*,³¹⁶ the court pointed out that this remark was *obiter*, and that it was therefore not bound to follow it.

Despite this uncertainty, one thing is clear: an English court will not refuse to entertain a defence of estoppel purely on the basis that the agreement fails to comply with statutory formalities and is therefore unenforceable or void. Whether this means, in the context of sales of land, that proprietary estoppel must overlap with the requirements of a constructive trust before it will be recognised, or whether it is possible to entertain proprietary estoppel even where the facts do not (also) give rise to a constructive trust, is irrelevant for current purposes. Both remedies recognise the existence of an oral agreement in spite of the fact that the relevant statute provides that that agreement is void or unenforceable, particularly when the refusal to recognise it would allow one of the parties to act in a fraudulent or unconscionable manner.

6 4 4 3 *Estoppel and statutory formalities in South African law*

It was stated above that it is a general principle of South African law that a contracting party will not succeed with a defence of estoppel if it would lead to the enforcement of an agreement which is void, *inter alia*, because it contravenes a statutory prescription.³¹⁷

³¹⁶ 2011 WL 2039893 para 30. See also the earlier case of *Shah v Shah* [2002] QB 35, where estoppel succeeded even in the absence of a constructive trust.

³¹⁷ See 6 4 4 1. The same rule does not apply when a successful defence of estoppel would contravene a prescription imposed by the parties themselves. Eg, estoppel could be relied upon, in theory at least, in the event of non-compliance with a non-variation clause, because such a clause will not protect a party against his own fraud. See *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 2 SA 343 (O) 346B-E; *Van As v Du Preez* 1981 3 SA 760 (T) 765H; *Nyanderi Local Municipality v Hlazo* 2010 4 SA 261 (ECM) para 48. Estoppel was also referred to in passing by Steyn CJ in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 4 SA 760 (A) 765C, although it is unclear to what extent the Chief Justice thought that it could be used to circumvent a non-variation clause – cf the conclusions of Margo J in *Phillips v Miller (2)* 1976 4 SA 88 (W) 93G-H and Coetzee R in *Barnett v Van der Merwe* 1980 3 SA 606 (T) 610H-611D. Another mechanism which may be available to counter an unconscionable reliance on self-imposed formalities is to categorise a particular requirement as amounting to the prescription of a mode of acceptance, rather than a formal requirement which is intended to be constitutive. In *Roberts v Martin* 2005 4 SA 163 (C) 169G-H and *Pillay v Shaik* 2009 4 SA 74 (SCA) para 53, such a characterisation of a signature requirement (which was not complied with by one of the parties) allowed the respective courts to apply the reliance theory and to hold that a valid contract had been concluded on the facts. Admittedly, there is a fine line between self-imposed

However, it does appear to be possible for a third party to rely on the defence against one of the original contracting parties to such an invalid agreement.

In *Trust Bank van Afrika Bpk v Eksteen*³¹⁸ (“*Trust Bank*”) the appellant discounted a number of hire-purchase agreements, or what appeared to be such agreements, in terms of the Hire Purchase Act 36 of 1942 (“*Hire Purchase Act*”). The parties to these agreements were a partnership, as the seller, and a number of purchasers of motor vehicles. In addition to the discounting agreement, the partners also bound themselves to the appellant bank as sureties for the debts of the purchasers. Some of the hire-purchase agreements were void due to non-compliance with the section 7(1) of the Act, because the prescribed deposits had not been paid by the purchasers³¹⁹ (contrary to what was contained in the written hire-purchase agreements³²⁰).

When some of the debtors defaulted, the appellant instituted a claim against the respondent as surety. The respondent alleged that because the hire-purchase agreements themselves were void, the suretyship agreement was also void. The appellant sought to estop the respondent from relying on the defence of invalidity, reasoning that the respondent had intentionally created the impression that the hire-purchase agreements were valid and that the appellant had acted on this representation to its detriment.³²¹

The appellant’s plea of estoppel succeeded. According to Steyn CJ, the appellant was not attempting to enforce the invalid hire-purchase agreements, but the so-called “*algemene ooreenkoms*”.³²² At this point, it should be stated that the reasoning of Steyn CJ is unclear. The only agreement in terms of which the appellant could sue, was the suretyship contained in the “*algemene ooreenkoms*”. In fact, the judge states that

formalities and prescribed modes of acceptance. This matter is discussed further in C Pretorius “*Reliance, Formalities and the Mode of Acceptance of an Offer*” 2011 *Obiter* 453.

³¹⁸ 1964 3 SA 402 (A) 412A-C.

³¹⁹ 409C.

³²⁰ 409H.

³²¹ 409D-E.

³²² See eg 412C-H.

“[w]at wel geëis word, is die omgekeerde van die huurkoopkontrakte, nl. dat die verkoper aan die kopers se verpligtings moet voldoen. Hierdie omgekeerde aanspreeklikheid is nie in die huurkoopkontrakte te vind nie ... Die respondent staan nie in vir die koper se verpligtings teenoor die verkoper nie, maar slegs vir sy verpligtings teenoor die sessionaris. Hy sou hom trouens uit die aard van die verhouding nie in ‘n huurkoopkontrak as borg vir of medeskuldenaar van ‘n koper teenoor homself kon bind nie.”³²³

However, later in his judgment, Steyn CJ says the following:

“Die Hof *a quo* het die eksepsie gehandhaaf ook op grond daarvan dat die respondent se verpligtings as borg ingevolge die algemene ooreenkoms, die nietige huurkoopkontrakte aanvul, dat hulle as aanvullende verpligtings by nietige kontrakte self nietig is, en dat die Hof nie kan toelaat dat hierdie nietige verpligtings deur estoppel geldig gemaak word nie. Indien estoppel egter om bogenoemde redes nie deur die tersaaklike beginsels betreffende die ongeldigheid van die [huurkoop]kontrakte uitgesluit word nie, sou dit volg, meen ek, dat dit ook nie uit hoofde van die ongeldigheid van aanvullende verpligtings uitgesluit word nie.”³²⁴

What the judgment does not state clearly enough, is that the appellant was seeking to estop the respondent from relying on the invalidity of the suretyship agreement because the respondent had represented the principal debts to be valid, a representation which was not contradicted *ex facie* the documentation. Steyn CJ held this to be a representation that allowed the defence of estoppel to succeed. Furthermore, to enforce this invalid suretyship agreement did not contravene the objects of section 7(1) of the Hire Purchase Act, one of which was to discourage people from purchasing goods that they could not afford.³²⁵ If estoppel were to be raised by one of the original contracting parties against his counterparty, this protective function would be negated. According to Steyn CJ, this would not be the case if estoppel was used to maintain the representation that the suretyship was valid:

“Ek kan egter nie aanneem nie dat die wetgewer in art. 7(1) bedoel het om met die geldigheidsvereistes, in ‘n geval soos hierdie, ‘n niksvermoedende derde te verhinder om estoppel op te werp, en hom sodoende in dieselfde posisie te plaas as iemand wat die doel van

³²³ 412D-F.

³²⁴ 413H-414A.

³²⁵ 409F; 411G.

die wetgewer wou verydel. Dit wil my voorkom dat die estoppel waarop die appellant hom beroep, nie in 'n geval van hierdie aard deur genoemde beginsels uitgesluit word nie.”³²⁶

This conclusion of the court finds approval with commentators such as Nienaber.³²⁷

However, the Chief Justice goes on as follows:

“[D]at ongeldigheid tussen twee partye 'n beroep op estoppel deur 'n derde uitsluit, is ook nie 'n beginsel wat deur ons regspraktyk bevestig is nie”.³²⁸

According to Nienaber,³²⁹ the court seems to be suggesting here that also where the third party claims in terms of the original invalid agreement, it may be possible to rely on estoppel (for example, on the facts of *Trust Bank*, if the appellant sued the purchasers in terms of the invalid hire-purchase agreements). Selvan disagrees,³³⁰ and concludes that the statement made by the court does not mean that in every case where such circumstances arise, a third party may rely on estoppel.³³¹ That may be true, but it doesn't negate the fact that Steyn CJ did seem to consider that it was possible that in certain circumstances a third party could estop an original party from relying on the invalidity of the agreement.

The minority judgment of Hoexter JA goes further. According to him,

³²⁶ 413A-C.

³²⁷ “Iets oor Verdiskontering, Estoppel en Borgtog” (1964) 27 *THRHR* 262 265. Nienaber approves of the court's conclusion on the basis that the enforcement of the agreement between the appellant and respondent was not prohibited by any piece of legislation and would also not promote a prohibited result. He states:

“Ons het hier wesenlik te doen met die geval van 'n borg wat die indruk geskep het dat die hoofvordering geldig is terwyl hy voor sy siel geweet het dat dit nie die geval was nie. In so 'n geval behoort estoppel wel deeglik teen hom te kan geld. Weliswaar is die borg se aanspreeklikheid akcessoor, maar die akessore karakter is nie so deurdringend dat dit ongeoorloof sou wees om 'n borg op grond van estoppel gebonde te hou aan die skyn waarvoor hy self verantwoordelik is nie, in weerwil van die nietigheid of ongeoorlooftheid van die hoofskuld.” (265; footnotes omitted).

³²⁸ *Trust Bank van Afrika Bpk v Eksteen* 1964 3 SA 402 (A) 413C.

³²⁹ 1964 *THRHR* 266.

³³⁰ “Discounting, Estoppel and Suretyship – A Divergent View” (1965) 28 *THRHR* 231. See the response to this article in P M Nienaber “Nogmaals Verdiskontering en Estoppel” (1966) 29 *THRHR* 51.

³³¹ Selvan 1965 *THRHR* 234.

"[t]he doctrine of estoppel is an equitable one, developed in the public interest, and it seems to me that whenever a representor relies on a statutory illegality it is the duty of the Court to determine whether it is in the public interest that the representee should be allowed to plead estoppel. The Court will have regard to the mischief of the statute on the one hand and the conduct of the parties and their relationship on the other hand."³³²

Hoexter JA acknowledged that the suretyship between the parties was invalid, but held that it was *dolus* on the part of the respondent to deny the very fact that he had held out to be true to the appellant.³³³ As a result, he also held that estoppel should succeed.³³⁴

It seems to be contradictory to state that the law will not allow an agreement which is void for failure to comply with a statutory prescription to be enforced indirectly by means of estoppel when that estoppel is raised by one of the parties to the contract, but to hold that the same rule does not apply when a third party seeks to achieve a similar result. In the more recent case of *Philmatt (Pty) Ltd v Mosselbank Developments CC*³³⁵ ("*Philmatt*"), it would appear that the then Appellate Division was also prepared to accept that there may be room for a third party to rely successfully on estoppel, this time in the context of an agreement which was void for failure to comply with formalities.³³⁶

³³² *Trust Bank van Afrika Bpk v Eksteen* 1964 3 SA 402 (A) 415H-416A.

³³³ 416B.

³³⁴ Hoexter JA's minority judgment subsequently formed the basis, *inter alia*, of the decision in *Credit Corporation of SA Ltd v Botha* 1968 4 SA 837 (N) in which it was held that an innocent third party (the appellant) was entitled to raise estoppel against the purchaser in order to enforce an agreement which did not comply with s 4 of the Hire Purchase Act 36 of 1942. After referring to Hoexter JA's statement quoted in the main text above, the court held that

"[w]hile ... the statute was designed to protect purchasers against their own indiscretion, it was not designed to protect them against persons innocent of the illegality. Here the respondent was a party to the illegality and the appellant unaware of it. [There] is no consideration of public policy which operates against the application of estoppel in the present circumstances." (851I-852A).

The status of this decision is uncertain in light of the subsequent judgment in *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 2 SA 15 (A) which is discussed further in the main text.

³³⁵ 1996 2 SA 15 (A).

³³⁶ However, see Van der Merwe et al *Contract* 141 n 99 who suggest that this case appears to have foreclosed the possibility that estoppel may be permitted when it would not subvert the policies underlying the relevant statute.

As discussed previously,³³⁷ the respondent offered to sell a number of properties to Wale Street Industrial Finance Limited or its nominee. A written contract of sale was concluded, and the appellant was subsequently nominated as the buyer. When the appellant tendered payment and demanded transfer of the properties in its name, the respondent alleged that the written agreement between itself and Wale Street was void because it failed to record a suspensive condition. One of the defences raised by the appellant was estoppel.

After confirming the general principle that estoppel cannot be relied upon to enforce a (formally) invalid contract,³³⁸ the court considered the contention that this does not apply when an innocent third party steps into the shoes of one of the original parties and relies on a representation that an agreement is valid. In support of this argument, the appellant cited the statement by Hoexter JA quoted above. The court dismissed the appellant's argument on the following basis: first, no representation was made by the respondent that a formally valid deed of alienation had been concluded between the original parties.³³⁹ Secondly, none of the other judges in the *Trust Bank* case concurred in Hoexter JA's judgment.³⁴⁰ Finally, the basis for Hoexter JA's judgment was *dolus* on the part of the respondent in that the respondent had specifically represented to the appellant that the hire-purchase agreements were valid when in fact they were not. No such unconscionable behaviour was present on the facts of the current case.³⁴¹

It will be noted that the court did not refer to the statement made in the majority decision in *Trust Bank* that seems to have a similar effect to that in Hoexter JA's judgment, albeit not stated as broadly. Furthermore, the court in *Philmatt* did not expressly hold that an innocent third party can never rely on estoppel in the face of formal invalidity, merely that on the facts before it, no representation had been made as to the formal validity of the agreement. It is therefore arguable that the possibility remains that a third party may successfully raise estoppel to prevent an original party from relying on the formal invalidity of the agreement.

³³⁷ See ch 4 (4 3 3).

³³⁸ *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 2 SA 15 (A) 26H-I.

³³⁹ 27D.

³⁴⁰ 27C.

³⁴¹ 27D-E.

It is perhaps appropriate to summarise the discussion of estoppel to this point. We have seen that English law does not automatically exclude estoppel where an agreement is formally defective. Rather, the focus is on the policy considerations underlying a particular formal requirement, in order to determine whether they also dictate that estoppel should not succeed. In the context of formalities imposed for guarantees and sales of land, the general opinion seems to be that these formal requirements do not aim to protect categories of persons who are vulnerable to exploitation, oppression or overreaching. For that reason, estoppel is not automatically excluded as a matter of law, although the facts may indicate that the requirements of estoppel have not been met. While South African courts have not engaged in this type of policy-based analysis when estoppel has been raised by one of the original contracting parties to a formally defective contract, it did inform the judgment in the *Trust Bank* case, albeit in the context of an agreement which was void for failure to comply with another type of statutory prescription. There the court specifically considered whether a successful plea of estoppel by a third party would contravene the protective purpose of the Hire Purchase Act and held that it would not.

It is therefore unclear why a South African court considers itself unable to engage in a similar analysis when estoppel is raised by one of the parties to the formally defective contract. Instead, it is repeatedly emphasised that formal requirements which are aimed at preventing fraud are imposed in the public interest and that, for that reason, estoppel may not be used to uphold a formally invalid agreement.³⁴² A similar sentiment has been expressed in recent cases dealing with estoppel and *ultra vires* conduct on the part of public authorities.³⁴³ However, in those cases a decision to uphold a defence of estoppel against a public authority which had acted *ultra vires* might indirectly have condoned nepotism or patronage and ultimately have placed a disproportionate and unnecessary burden on taxpayers.³⁴⁴

³⁴² See eg *Oceanair (Natal) (Pty) Ltd v Sher* 1980 1 SA 317 (D) 326B-C; *Fuls v Leslie Chrome (Pty) Ltd* 1962 4 SA 784 (W) 788A-B.

³⁴³ See eg *Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd* 2001 4 SA 142 (SCA) para 11; *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 3 SA 1 (SCA) para 16.

³⁴⁴ *Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd* 2001 4 SA 142 (SCA) paras 8-9, 12; *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 3 SA 1 (SCA) para 15.

By contrast, it is not self-evident that a decision to uphold a defence of estoppel in the context of a formally invalid contract could have equally broad ramifications for the public interest. In fact, allowing a defence of estoppel to fail could promote, rather than prevent fraud.³⁴⁵ It is arguable that in this instance it is not in the public interest to allow a party to rely on formal requirements as a means to escape an agreement which was seriously intended. In other words, it is sometimes necessary to give effect to an individual's interest in enforcing a formally invalid contract in order to promote the public interest in preventing fraud or unconscionable conduct. As Trakman states:³⁴⁶

"[I]nterests of the parties *inter se* are themselves public interests that require judicial consideration in the same way as interests of the state and society are given public significance".³⁴⁷

To which Lubbe replies:³⁴⁸

"Hierdie standpunt is volkome aanvaarbaar vir sover daarmee te kenne gegee word dat by die bepaling van die openbare belang nie slegs rekening gehou moet word met die algemene norme en oorwegings nie, maar ook individualiserend na besondere belange ter sprake by 'n spesifieke transaksie, gekyk moet word."³⁴⁹

Accepting the general proposition that it is sometimes in the public interest to allow a defence of estoppel to succeed in spite of the existence of a formally invalid contract, does not imply that the mere conclusion of such an invalid contract constitutes a sufficient basis for a successful defence. As indicated in *Edelmann II*, *Actionstrength* and *Yaxley*, and as suggested in the *Trust Bank* and *Philmatt* cases, there must be a representation made by the estoppel-denier to the estoppel-raiser (whether one of the contracting parties or a third party) that the agreement is valid or, perhaps, that he will abide by the agreement in spite of the fact that it does not comply with formal requirements. Where a third party relies on the defence, it is suggested further that it should not be possible to discern, whether from the document itself or from surrounding circumstances, that the agreement upon which he

³⁴⁵ A J Kerr *The Principles of the Law of Contract* 6 ed (2002) 146-147 also suggests that estoppel may be an appropriate mechanism to prevent an unconscionable reliance on formal invalidity.

³⁴⁶ "The Effect of Illegality in South African Law: A Doctrinal and Comparative Study" (1977) 94 *SALJ* 327.

³⁴⁷ 330.

³⁴⁸ "*Bona Fides*, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktereg" (1990) 1 *Stell LR* 7.

³⁴⁹ 17.

relies is formally defective. For example, in *Trust Bank* the agreement appeared to be valid *ex facie* the document and it would have been unreasonable to expect the appellant to question every principal debtor as to the validity of his hire-purchase agreement.

Whether knowledge of possible formal invalidity on the part of an original contracting party should preclude a defence of estoppel is a more complex issue. However, *Edelmann II* and the minority judgment of Hoexter JA in *Trust Bank* both emphasise that in this case, a court should consider the relationship between the relevant parties and determine the extent to which the estoppel-raiser was in a position to insist that the formal requirements should have been met. For example, in *Mouton v Hanekom*³⁵⁰ (which was discussed in the previous chapter³⁵¹), the respondent was aware that the *pactum de retrovendendo* should have been included in the written sale agreement. However, as the facts indicate, the respondent had little or no commercial experience while the appellant, his nephew, was a successful businessman;³⁵² the appellant insisted that he would only assist the respondent with a loan if the latter sold his farm to him;³⁵³ the respondent was reluctant to do so and only agreed to the sale when the appellant promised that he could buy back the land for the same price plus transfer costs;³⁵⁴ and finally, when informed that the *pactum de retrovendendo* should be reduced to writing, the appellant stated that this was unnecessary because the parties were kin and he would keep his word.³⁵⁵ It is suggested that even though the respondent was aware that the agreement should have been in writing, the fact that he was at a commercial disadvantage and in a close relationship with the appellant meant that he was not in a position to insist that the formal requirements should be met. The appellant on the other hand exploited the relative weakness of the respondent, in addition to indicating that he would honour the bargain. For these reasons, it is suggested that this case provides a good example of a situation in which estoppel should succeed, notwithstanding the respondent's knowledge that the *pactum de retrovendendo* should have been reduced to writing.

³⁵⁰ 1959 3 SA 35 (A).

³⁵¹ See ch 5 (5 4 3).

³⁵² *Mouton v Hanekom* 1959 3 SA 35 (A) 36C-E.

³⁵³ 36H-37A.

³⁵⁴ 37A.

³⁵⁵ 38G.

In conclusion it is suggested that the South African courts reconsider their approach to the use of estoppel in the context of formal invalidity. In comparison to its English and German counterparts, the South African approach to available remedies is highly restrictive. We saw in a previous chapter that South African law recognises no exceptions to the applicability of formal requirements based on the characteristics or interests of the parties.³⁵⁶ This strict approach could be tempered somewhat by recognising that estoppel should succeed in circumstances which do not justify, or appear to be entirely at odds with, a strict insistence on compliance with formal requirements. There are different reasons for the invalidity of contracts, not all of which necessitate the automatic exclusion of the defence of estoppel. This is not a novel idea – for example, it underlies a court's approach to determining whether an enrichment remedy is available and if so, which one.³⁵⁷ It is submitted that this notion should also inform its approach to the use of estoppel in the context of formally invalid agreements, both when estoppel is raised by a third party and when it is raised by an original contracting party. The failure of South African courts to do so is at odds with their own approach to enrichment law and, as will become apparent in the next section, their approach to the curative effect of full performance of a void contract.

6 5 Full performance of a formally defective contract

6 5 1 Introduction

Thus far, the discussion has focused on the remedies available where there has been only partial performance of a formally defective contract. The consequences of full performance will now be considered, both from an enrichment perspective and in the context of the functions of formalities. It will become apparent that all the jurisdictions under consideration give effect to a fully-performed, reciprocal contract which does not comply with prescribed formal requirements. Less certain, at least from a South African

³⁵⁶ See ch 2 (2 3 4).

³⁵⁷ As discussed above (6 3 3 2), a SA court is required to determine whether an agreement is invalid because it is illegal or merely formally defective. In the absence of a statutory enrichment remedy, the reason for the invalidity will determine which enrichment claim is applicable. Furthermore, where there has been full performance of the invalid contract (see 6 5 below), the reason for the invalidity (and the policy considerations underlying such a sanction) may determine whether restitution is awarded in spite of the full performance. See also Du Plessis *Law of Unjustified Enrichment* 209-211.

perspective, is whether a court should also give effect to a formally defective contract which requires unilateral performance, like a suretyship.

6 5 2 Full performance and enrichment law

There appears to be a number of alternative explanations for the curative effect of full performance in the context of an invalid reciprocal contract. For example, in the *Wilken* case, Innes J made the following *obiter* observation:

“Neither party would be able to upset the concluded transaction on the mere ground that the *causa* stated in the deed of transfer was called a contract of sale, whereas it was in reality an agreement to sell, invalid and unenforceable in law, but which both seller and purchaser proposed to carry out ... Neither party could say that he had been enriched at the expense of the other; and the *traditio* duly made with knowledge of all the facts and with the intent to pass the *dominium* and the price duly paid with similar knowledge and with the object of acquiring *dominium* would bind the respective parties.”³⁵⁸

The first possible explanation is evident in Innes J’s statement that full performance of a reciprocal contract means that neither party has been enriched by the other’s performance.³⁵⁹ It is not entirely clear how the mere fact that the plaintiff has received the defendant’s performance cancels the latter’s enrichment – Du Plessis notes that “[t]he fact that the plaintiff was enriched by the counter-performance cannot somehow ‘neutralise’ the enrichment resulting from the plaintiff’s transfer”.³⁶⁰ It is presumably for this reason that the second, alternative explanation evident in the quotation above has been adopted in more recent judgments.

This explanation focuses on the achievement of the purpose of the transaction: when the land has been transferred and the purchase price paid, each party’s purpose has been achieved and there appears to be no reason to upset this state of affairs. Similar

³⁵⁸ *Wilken v Kohler* 1913 AD 135 144.

³⁵⁹ The same explanation appears in *MCC Bazaar v Harris & Jones (Pty) Ltd* 1954 3 SA 158 (T) 162.

³⁶⁰ *Law of Unjustified Enrichment* 196 n 7. Sonnekus *Unjustified Enrichment in SA Law* 263 n 173 disagrees (“once both parties have performed ... neither may allege that the other has been unfoundedly enriched at his expense to the extent that restitution is necessary or desirable”).

reasoning underlies the following statement in the minority judgment of Marais JA in *Wilkins NO v Bester*.³⁶¹ The judge pointed out that

“[t]here are ... instances in the law where the performance of obligations which, objectively regarded, were *indebita*, are nonetheless regarded effectively as if they were not”,³⁶²

and referred to examples like full performance in terms of a formally defective sale of land, and transfers of ownership where the obligation-creating agreement was invalid, but the real agreement was not.³⁶³ Marais JA concluded:

“Whether or not in any given case either of the parties may claim to undo the performance is [a] question the answer to which will depend upon the reason why the contract is invalid, but these [examples] illustrate at least that the law can, and often does, give effect to the mutual intention and intended acts of parties even if the contract pursuant to which the acts were performed was invalid.”³⁶⁴

Brand JA expressed his approval of this “achieved purpose” analysis in the *Legator* case.³⁶⁵ According to the judge, the policy consideration underlying the curative effect of full performance of an invalid reciprocal contract is that

“those who received exactly what they bargained for should not be allowed to escape the consequences of a bad bargain by means of an enrichment action which is intended to be an equitable remedy”.³⁶⁶

The assumption is that a plaintiff who seeks to recover his performance when there has been full performance by both parties, is doing so purely for opportunistic reasons.³⁶⁷ It is not a goal of the law of unjustified enrichment to come to the assistance of a party who

³⁶¹ 1997 3 SA 347 (SCA).

³⁶² 362D.

³⁶³ 362D-G.

³⁶⁴ 362G-H.

³⁶⁵ 2010 1 SA 35 (SCA) para 28. See also Scott *Unjust Enrichment by Transfer* 310; J C Sonnekus “Is Die Ongegronde van Afgesproke Prestasie Steeds Verryking?” 2008 *TSAR* 605 610-612; Visser *Unjustified Enrichment* 469-470.

³⁶⁶ *Legator McKenna Inc v Shea* 2010 1 SA 35 (SCA) para 28.

³⁶⁷ P Birks “No Consideration: Restitution after Executed Void Contracts” (1993) 23 *WALR* 195 199, 206 ff. See also S Meier “Unjust Factors and Legal Grounds” in D Johnston & R Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002) 37 70.

claims the return of his performance simply because he no longer wants to achieve his original purpose - for example, because he has found a better bargain elsewhere.

What exactly becomes of the void contract once fully performed, is not stated in the *Legator* judgment. In the context of alienations of land, the question is irrelevant because the Alienation of Land Act explicitly provides that the contract is deemed to be valid *ab initio* once there has been full performance.³⁶⁸ In the absence of such a statutory provision however, why is an enrichment remedy denied when the parties achieve their mutually intended purpose?

Again, there seems to be more than one possible answer. The first is that the achievement of the purpose of the transaction means that a basis for the transfer is deemed to exist retrospectively.³⁶⁹ This argument could explain Solomon JA's comments in the *Wilken* case on the effect of full performance of an invalid contract:

"It was contended ... that inasmuch as the land has been transferred and the purchase price paid under the verbal agreement, the contract must be treated as valid notwithstanding the provisions of the section. For otherwise, the argument runs, the transfer itself could be set aside on the ground that it was based upon a void contract, and that, therefore, there was no legal *causa* for the transfer. That question does not arise for decision in this case, and it is, therefore, better not to express a decided opinion upon it. But I must say that I should feel great difficulty in holding that there was no *causa* for a transfer of land for which [the purchase price] had been paid."³⁷⁰

An alternative explanation for, and interpretation of, this reasoning is that the refusal of an enrichment action in the context of full performance of a void reciprocal contract is simply due to the fact that there has been no failure of consideration as understood in English law: the desired counter-performance has been received.³⁷¹ According to Scott, Solomon JA

³⁶⁸ S 28(2). This is also the effect of full performance of formally invalid sales of land (§ 311b(1) BGB, second sentence), donations (§ 518(2) BGB) and suretyships (§ 766 BGB, third sentence) in German law.

³⁶⁹ Du Plessis *Law of Unjustified Enrichment* 52 n 162.

³⁷⁰ *Wilken v Kohler* 1913 AD 135 149.

³⁷¹ Scott *Unjust Enrichment by Transfer* 298; Visser *Unjustified Enrichment* 470. Both authors reiterate this view in H Scott & D Visser "The Impact of Legal Culture on the Law of Unjustified Enrichment: The Role of Reasons" in E Bant & M Harding (eds) *Exploring Private Law* (2010) 153 155.

"[c]learly did not believe that the basis (*causa*) of the parties' performances was the validity of the contract itself. Rather it was the other party's reciprocal performance."³⁷²

It is not entirely clear how Solomon JA's opinion that performance occurs in order to receive a counter-performance necessitates the conclusion that the effect of full performance must be explained in terms of an English unjust factor. In fact, the last sentence of the quoted portion of his judgment appears to support a contrary conclusion, namely that "the achievement of the *causa* (purpose) of the transfers, results in the existence of a *causa* (legal ground) for their retention."³⁷³

In any event, the meaning of failure of consideration in English law has become decidedly complicated in the context of full performance of void contracts. In a previous section it was stated that consideration, as it is used in the English law of unjust enrichment, means the expected counter-performance.³⁷⁴ Failure of consideration either means that no counter-performance has in fact been received or, in the context of formally defective unenforceable contracts, that the defendant is not willing and able to deliver his counter-performance. However, failure of consideration has received an alternative meaning in light of the so-called swaps cases.

In the 1980s, a large number of English local authorities and banks concluded interest rate swap agreements.³⁷⁵ In 1992, the House of Lords declared these swap agreements to be void because they fell outside the powers of the local authorities and were therefore *ultra vires*.³⁷⁶ A series of subsequent cases then considered whether any payments made in terms of the void swaps could be reclaimed and if so, on what basis. In some of these

³⁷² *Unjust Enrichment by Transfer* 298 (footnote omitted).

³⁷³ Du Plessis *Law of Unjustified Enrichment* 52 n 162.

³⁷⁴ 6 3 3 4.

³⁷⁵ Interest rate swaps have been described as follows:

"[O]ne party promises to pay the other a fixed rate of interest on a notional sum for a fixed period, say 5 per cent on £5 million for five years with quarterly settlement dates, and, on otherwise identical terms, the counter-party promises to pay a floating rate determined by a formula. If interest rates fall the floating payer will pay less and will thus win; vice versa if they rise." (Birks *Unjust Enrichment* 109).

³⁷⁶ *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1.

cases,³⁷⁷ the swaps were “closed” in the sense that they had run their course and each party had received the bargained-for counter-performance. Nevertheless, claims for restitution were granted, on the basis of failure of consideration. Apparently, the consideration here was not the actual counter-performance, but the benefit of a valid obligation. Neither party had received this, because the swap agreement was *ultra vires* and therefore void.³⁷⁸

These decisions seem to be irreconcilable with other English cases on the full performance of formally invalid contracts. For example, in *Tootal Clothing Ltd v Guinea Properties Ltd*³⁷⁹ (“*Tootal*”) the court held that the provisions of the Law of Property (Miscellaneous Provisions) Act are only applicable to executory contracts:

“If parties choose to complete an oral land contract or a land contract that does not in some respect or other comply with section 2, they are at liberty to do so. Once they have done so, it becomes irrelevant that the contract which they have completed may not have been in accordance with section 2”.³⁸⁰

Tootal was not referred to in the decisions relating to “closed swaps”. However, it has been relied on in a case decided after the swaps cases³⁸¹ in which an oral agreement for the sale of land had been fully performed. The concept of failure of consideration cannot explain these different results. In both, the contracts were void and in both there had been full performance. Yet restitution was awarded in one group of cases on the basis that the contract was invalid and full performance was regarded as irrelevant; in another, the invalidity of the contract itself was deemed insufficient, in the event of full performance, to grant a restitutionary remedy. It is suggested, and this point will be addressed more fully

³⁷⁷ See *Westdeutsche Landesbank Girozentrale v Islington* (1993) 91 LGR 323; *Guinness Mahon & Co Ltd v Kensington and Chelsea London Borough Council* [1999] QB 215.

³⁷⁸ *Westdeutsche Landesbank Girozentrale v Islington* (1993) 91 LGR 323 367; *Guinness Mahon & Co Ltd v Kensington and Chelsea London Borough Council* [1999] QB 215 227.

³⁷⁹ (1992) 64 P & CR 452.

³⁸⁰ *Tootal Clothing Ltd v Guinea Properties Ltd* (1992) 64 P & CR 452 455. The same reasoning – formal requirements apply only to executory and not executed contracts – has been used to explain the effect of full performance of a formally defective contract which is unenforceable in terms of the Statute of Frauds. For a list of cases, see C N Brown *Corbin on Contracts 4: Statute of Frauds* §§ 12.1-23.11 (1997) 53.

³⁸¹ *Mirza v Mirza* 2009 WL 6095 para 143.

below,³⁸² that the different conclusions may be explained on the basis of policy considerations. For current purposes, the point is that the meaning of failure of consideration has become rather problematic in English law and for this reason alone, should rather be avoided in any explanation for the curative effect of full performance of a void contract in South African law.

In this discussion no distinction has been drawn between a party who performs in the knowledge that the contract is void, and one who performs in the mistaken belief that the contract is valid. In *Wilken*, Innes J confined his remarks on the effect of full performance to parties who had acted “with knowledge of all the facts”.³⁸³ S 28(2) of the Alienation of Land Act also does not specify whether it applies in the event of mistake. According to De Vos, the rule in *Wilken*, and also the provision in the Alienation of Land Act, should only apply where both parties have performed in full despite their knowledge that the agreement was void.³⁸⁴ Where a party mistakenly believed that the agreement was valid, he should not be precluded from reclaiming that performance with the *condictio indebiti*, despite performance by the other party. The same conclusion was drawn in *Jan van Heerden & Seuns BK v Senwes Bpk*,³⁸⁵ but doubted in *Hoffmann v Hoffmann*.³⁸⁶

The matter was settled in the *Legator* case. Brand JA held that the curative effect of full performance would also apply where a party had performed in the mistaken belief that the contract was valid:

“the *condictio indebiti* would normally be available because the transfer was motivated by a mistaken belief relating to the validity or the existence of the underlying agreement. And [the

³⁸² See 6 5 3.

³⁸³ *Wilken v Kohler* 1913 AD 135 144.

³⁸⁴ *Verrykingsaanspreeklikheid* 189, 196.

³⁸⁵ 2006 1 All SA 44 (NC) para 46.2. The decision was overturned on appeal in *Senwes Ltd v Jan van Heerden & Sons* CC 2007 3 All SA 24 (SCA), although the court did not specifically address the conclusion that one party can still reclaim his performance when he mistakenly thought that the contract was valid despite the fact that there had been full performance. Nevertheless, it did state that while it was unnecessary “to deal with any of the other conclusions arrived at by the court *a quo* ... this court’s failure to do so must not be construed as an endorsement of their correctness” (para 32).

³⁸⁶ 1999 2 All SA 80 (C) 86.

rule in] *Wilken v Kohler* would constitute an exception to the *condictio indebiti* for the same reason, ie that the purpose of the transaction had been achieved.”³⁸⁷

For Shea, this conclusion meant that she had no claim at all for the return of her house.

Brand JA does not explain why the achievement of the purpose of the transaction should render a mistake as to its validity irrelevant. Birks has argued that in the event of full performance of a void contract, the force of the mistake as to the liability to perform is “spent”.³⁸⁸ More specifically, he states that

“although [the claimant] would not have transferred but for his mistake, the supposed liability was no more than the means to the end which was desired.”³⁸⁹

The “end” or ultimate purpose of the performance is receipt of the counter-performance. Therefore, the prejudice which could arise from a mistake regarding one’s liability to perform is only relevant where there has been no counter-performance, because the party who has performed cannot sue for that counter-performance. There is no such prejudice once the counter-performance has been received, and any mistake regarding the validity of the contract which may have motivated a party to perform becomes irrelevant.

To summarise: the reason why an enrichment claim is precluded in the context of full performance of a void reciprocal contract is because the purpose of the transaction has been achieved. Each party has received exactly what it bargained for. This “achieved purpose” analysis is applicable both where performance took place in the knowledge that the contract was void (which leads to the inference that the reason for performing is to receive the counter-performance³⁹⁰); and where such knowledge is absent (because the ultimate purpose of the performance is to receive the counter-performance, in which case the mistake as to one’s liability to perform becomes irrelevant). Achieving the purpose of the transaction excludes an enrichment claim because (i) it renders the underlying contract valid *ab initio* (in the case of section 28(2) of the Alienation of Land Act); or (ii) it

³⁸⁷ *Legator McKenna Inc v Shea* 2010 1 SA 35 (SCA) para 28.

³⁸⁸ 1993 WALR 230 n 137.

³⁸⁹ 230 n 137.

³⁹⁰ This ties in with the *condictio causa data causa non secuta* being available if the knowing transferor’s purpose of obtaining counter-performance is not achieved. See 6 3 3 4 1 above.

retrospectively creates a legal basis for the transfer of the performance (or, rather less convincingly, because there has been no failure of consideration).

Nevertheless, this “achieved purpose” analysis has its limitations. First, it cannot operate to exclude enrichment claims in all situations. For example, it will not be applicable in the context of a fully-performed agreement which is void because it is illegal: the parties have achieved the purpose of their bargain, but the law views that bargain or purpose with disfavour.³⁹¹ Similarly, an enrichment remedy should not be denied where there has been full performance of a contract which is void due to a material mistake. By definition, there has been a defect in the bargaining process and to give the parties exactly what they “bargained” for would be to ignore precisely this defect. This leads to the second limitation: the “achieved purpose” analysis can only operate when there is clarity as to what performance the parties intended.³⁹² Finally, it is unclear to what extent the analysis is applicable to contracts in which performance is unilateral rather than reciprocal. These are essentially contracts of donation and suretyship.

In the case of donations, the legislature has by implication provided that performance of a formally invalid contract of donation cures the defect in form.³⁹³ According to Visser, this curative effect of performance occurs because the purpose of the transaction, namely to discharge an obligation to donate, has been achieved.³⁹⁴ The reason or motive for the transfer becomes irrelevant once this occurs. Arguably, one could use the same analysis in the context of full performance of a formally invalid suretyship. The purpose of performance in terms of a suretyship is to discharge a debt;³⁹⁵ once there has been full payment, even if payment has occurred in terms of a formally invalid contract, this purpose is achieved and any mistake as to liability becomes irrelevant.

³⁹¹ See *Legator McKenna Inc v Shea* 2010 1 SA 35 (SCA) para 29; *Afrisure CC v Watson NO* 2009 2 SA 127 (SCA) para 49; Du Plessis *Law of Unjustified Enrichment* 163.

³⁹² Du Plessis *Law of Unjustified Enrichment* 163.

³⁹³ S 5 of the General Law Amendment Act provides that

“no *executory* contract of donation ... shall be valid unless the terms thereof are embodied in a written document signed by the donor or by a person acting on his written authority granted by him in the presence of two witnesses.” (Emphasis added).

³⁹⁴ Visser *Unjustified Enrichment* 473-474.

³⁹⁵ See 6 3 3 3 above.

It is somewhat peculiar that the legislature did not provide for the curative effect of full performance in the context of suretyship agreements, particularly in view of the fact that the formal requirements for both donations and suretyships were promulgated in the same Act. It is even more odd that the South African Law Revision Committee, upon whose recommendation these formal requirements were prescribed, clearly specified that they would only apply to executory contracts of donation (without providing any reasons for this decision) but made no similar express provision in relation to suretyships.³⁹⁶ The question then becomes: despite these apparent omissions, should full performance in terms of a formally invalid suretyship also preclude an enrichment claim? This is addressed in the following section.

6 5 3 Full performance and the functions of formalities

A further explanation for the curative effect of full performance in the context of a formally defective agreement is one which looks at the policy considerations underlying the imposition of formalities. As Marais JA noted in *Wilkins NO v Bester*,³⁹⁷ the question whether full performance by both parties in terms of a void contract should preclude an enrichment claim depends on the reason for the invalidity of the transaction. A similar sentiment was expressed in *Guinness Mahon & Co Ltd v Kensington and Chelsea London Borough Council*,³⁹⁸ one of the English cases on restitution in the context of a closed swap. Taking into account the fact that different policy considerations underlie the *ultra vires* doctrine and the formal requirements imposed for sales of land also assists in reconciling the contradictory English approaches to full performance in the context of void agreements.³⁹⁹ In the latter situation, the formal requirements are imposed to promote certainty as to what has to be performed. These considerations fall away once there has been full performance.⁴⁰⁰ In fact, unwinding a fully-performed sale of land would create

³⁹⁶ *Second Report* (15-16 June 1950) paras 38, 42 (unpublished report available at the Brand Van Zyl Law Library, UCT).

³⁹⁷ 1997 3 SA 347 (SCA) 362G.

³⁹⁸ [1999] QB 215 231-232.

³⁹⁹ Birks *Unjust Enrichment* 257; McMeel *Modern Law of Restitution* 176; Whittaker "Form" in *Chitty on Contracts* 1 428.

⁴⁰⁰ In German law, an additional reason for the curative effect of full performance in the context of formally invalid sales of land is that the formal requirements for registration of the transfer are regarded as functionally equivalent to those imposed for the actual agreement of sale. See § 925 BGB; Von Mehren

uncertainty and a lack of finality.⁴⁰¹ By contrast, the *ultra vires* doctrine was formulated to protect the public and the refusal to award restitution in this context would undermine this protective purpose by clothing *ultra vires* transactions with validity.⁴⁰²

This brings us back to the question raised at the end of the previous section: should full performance of a formally invalid suretyship preclude an enrichment remedy? In German law, the answer is in the affirmative: the third sentence of paragraph 766 BGB explicitly provides that full performance cures the defect in form and the suretyship is regarded as valid. From the perspective of the functions of formalities, the traditional explanation for the curative effect of performance here is that the need to warn the surety of the potentially onerous obligation which he is undertaking becomes irrelevant. This warning is thought to be necessary because the surety is usually not required to pay immediately upon conclusion of the contract.⁴⁰³ However, if the surety decides to pay in terms of a formally invalid suretyship, the act of parting with his money is thought to have been inspired by careful consideration in any event.⁴⁰⁴ In other words, it is assumed that when the surety is faced with a claim from the creditor, the threat of diminishing wealth would lead him to ask all relevant questions, including whether the agreement is formally valid. If he pays voluntarily thereafter, the additional caution that would have been served by reducing the agreement to writing is regarded as superfluous.

This explanation is sharply criticised by German academics.⁴⁰⁵ The reason for the criticism is based on the fact that the curative effect of full performance also applies where the surety mistakenly assumes that the suretyship is valid and therefore pays without question.⁴⁰⁶ As a result, the third sentence of paragraph 766 BGB has been described as

“Formal Requirements” in *Int Enc Comp L VII* 110; Einsele “§ 125” in *Münchener Kommentar* 1 n 48; T Krebs “In Defence of Unjust Factors” in D Johnston & R Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002) 76 89.

⁴⁰¹ Scott *Unjust Enrichment by Transfer* 285 n 88.

⁴⁰² See statements to this effect in *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1 36; *Guinness Mahon & Co Ltd v Kensington and Chelsea London Borough Council* [1999] QB 215 229, 232-233; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 387, 415.

⁴⁰³ Krebs “In Defence of Unjust Factors” in *Unjustified Enrichment* 89.

⁴⁰⁴ Von Mehren “Formal Requirements” in *Int Enc Comp L VII* 110.

⁴⁰⁵ See eg Einsele “§ 125” in *Münchener Kommentar* 1 n 48; H Heiss *Formmängel und ihre Sanktionen: Eine privatrechtsvergleichende Untersuchung* (1999) 279 ff.

⁴⁰⁶ Habersack “§ 766” in *Münchener Kommentar* 5 n 8.

a “rechtspolitisch-verfehlt⁴⁰⁷ Vorschrift” (roughly translated as “a doctrinally unsound provision”) because such a surety has not had the advantage of the warning which would have been provided by reducing the agreement to writing.

Turning to South African law, the question is whether the German rule regarding the curative effect of full performance pursuant to a formally invalid suretyship should be adopted wholesale, or whether it should heed the criticism of the rule by German academics. Although there is no case law on this point, the fact that neither the legislature nor the South African Law Revision Committee made provision for the curative effect of full performance in this context suggests that the answer should be in the negative, irrespective of the particular facts of the situation. However, it is argued that a distinction can be drawn between a surety who pays knowing that the agreement is formally invalid and one who does so in the mistaken belief that the agreement was valid.

As discussed above,⁴⁰⁸ and in the absence of compulsion, a surety who pays knowing that the agreement is formally invalid will not be entitled to reclaim his performance with the *condictio indebiti*. The assumption is that in such a case, the surety intended to discharge the debt of the principal debtor and not his own (formally invalid) obligation. In this scenario, the need to caution the surety is unnecessary and the need to protect the creditor’s reliance that the undue transfer was a donation should take precedence.⁴⁰⁹

When the surety performs because he mistakenly believes that he is obliged to do so, it is argued that he should be entitled to reclaim his performance. In this context, he would not have thought to query the validity of the agreement and full payment of the debt cannot be taken as evidence of the fact that the surety’s decision to perform was preceded by a careful consideration of whether he was obliged to do so. By contrast, formal requirements are imposed for donations primarily to ensure that there was a serious

⁴⁰⁷ Einsele “§ 125” in *Münchener Kommentar* 1 n 48.

⁴⁰⁸ 6 3 3 3.

⁴⁰⁹ The traditional justification for requiring proof of a mistake before the *condictio indebiti* will be applicable is to show that the recipient was not entitled to rely on the undue transfer as a donation. The same justification applies if a party can show that he was coerced into paying – although the transferor is not mistaken, the recipient of the undue transfer can hardly believe that the transferor intended to make a donation. Du Plessis *Law of Unjustified Enrichment* 168-170.

intention to conclude such a transaction.⁴¹⁰ Full performance of a donation provides *ex post facto* evidence of such an intention in any event and it is suggested that the legislature's decision to make provision for the curative effect of performance in this context, irrespective whether the donor performed because he thought the donation was valid, is due to the fact that performance can be treated as the functional equivalent of the formal requirement. Full performance of a formally invalid suretyship by a surety who mistakenly thought he was obliged to do so can never serve as the functional equivalent of the warning which the surety should have received regarding the nature of his obligations. For these reasons it is argued that full performance in this situation should not have a curative effect.

6 6 Conclusion

This chapter has considered the remedies available to parties who have performed in purported fulfilment of contracts that do not comply with formalities. These remedies depend, in theory at least, on whether such non-compliance results in voidness, voidability or unenforceability.⁴¹¹ This in turn is determined by the extent to which a formal requirement is imposed in the public interest or whether it serves more individualised interests.⁴¹² A "balance of interests" analysis has revealed that when a formality is imposed in the public interest, the tendency is to declare a formally defective contract invalid; a lesser consequence is imposed when the formality serves the interests of a particular class or even a specific group in a particular class.

In South African law, the formal requirements imposed for sales of land and suretyships have always been held to be aimed at promoting the public interest. For this reason, a party who has performed in terms of a formally invalid sale or suretyship is limited to a claim for restitution, whether based on statute or unjustified enrichment.⁴¹³ He may not seek enforcement of such a contract, either directly or indirectly, by means of estoppel or

⁴¹⁰ See Van der Merwe et al *Contract* 140; *Jordaan and Others NNO v De Villiers* 1991 4 SA 396 (C) 400F-G.

⁴¹¹ 6 2 2.

⁴¹² 6 2 3.

⁴¹³ 6 3 3. Where performance has occurred in terms of a void sale of land, there is also the option of the *rei vindicatio*, although it is unlikely that the mere formal invalidity of the sale agreement would affect the transfer of ownership (see 6 3 2).

some other mechanism. Apparently, to award such a remedy would contravene the policy considerations underlying formal requirements, including the prevention of fraud, and the resultant declaration of invalidity for non-compliance.⁴¹⁴

This strict insistence on the invalidity of a formally defective agreement where only one of the parties has performed, is not evident where both parties have performed in full.⁴¹⁵ In this situation, the policy consideration underlying the declaration of formal invalidity is secondary to the policy consideration that each party has received what he bargained for and the assumption that the only reason why a party would want to reclaim his performance in this context is because he has found a better bargain elsewhere. This explanation is used to justify section 28(2) of the Alienation of Land Act which explicitly provides for the curative effect of full performance pursuant to a formally invalid sale of land, but the general principle has been held to apply to full performance of all void reciprocal contracts, with some exceptions. Whether full performance should have the same effect in the context of a formally invalid suretyship, where performance is unilateral, has not yet been determined. Ultimately, it is suggested that full performance should have this curative effect if the surety knew the agreement was formally invalid; in the absence of such knowledge, it is argued that the need to protect a mistaken surety from the effects of his decision to perform should take precedence.

By contrast, German and English courts adopt a more flexible approach. In addition to awarding enrichment remedies and recognising the curative effect of full performance, these jurisdictions acknowledge that there are instances in which a party's expectation or reliance interest should be protected, despite the fact that such a party has performed in terms of a formally invalid agreement.⁴¹⁶ The remedies in terms of the doctrine of *culpa in contrahendo* and paragraph 242 BGB in German law, and estoppel in English law, are awarded when the strict insistence upon compliance with formal requirements upon pain of invalidity would condone unconscionable behaviour on the part of the defendant. Common to all these remedies is the notion that one party is relying on formal invalidity in order to escape an agreement which was seriously intended.

⁴¹⁴ 6 4 4 3.

⁴¹⁵ 6 5.

⁴¹⁶ See 6 4.

The current South African approach does not appear to be inclined to take into account equitable considerations when determining the appropriate remedy in instances of formal invalidity. However, it has already been recognised in enrichment law, and in the context of full performance of a void contract, that a contract can be invalid for different reasons. If a distinction can be drawn in these contexts between different types of policy considerations, then it should be equally possible for a South African court to do so in the context of formally invalid agreements. Some formal requirements are imposed for protective purposes, which suggest that a successful reliance on estoppel would render that protective purpose nugatory. Others, like those prescribed for suretyships and sales of land, are not aimed at addressing the vulnerabilities of particular classes of contracting parties, but are imposed for more general purposes, like the prevention of fraud, perjury and unnecessary litigation. While the latter policy considerations are in the public interest, it is argued that it is equally in the public interest that a formal requirement should not be used to promote the type of unconscionable behaviour inherent in relying on a mere technical defence to escape an agreement which was seriously intended. The merit in considering the German and English approaches in this regard is twofold: they support the type of policy analysis already discussed, and they clarify the considerations to be taken into account when determining whether a court should enforce a formally invalid agreement. Therefore it is suggested that South African courts reconsider their approach to the application of estoppel in the context of a formally invalid agreement. This reassessment would allow the South African law to develop and mature in line with its civilian and common-law counterparts and avoid the harshness inherent in the current position.

ADDENDUM A

SOUTH AFRICA

Alienation of Land Act 68 of 1981

1 Definitions

(1) In this Act, unless the context otherwise indicates- ...

'alienate', in relation to land, means sell, exchange or donate, irrespective of whether such sale, exchange or donation is subject to a suspensive or resolutive condition, and 'alienation' has a corresponding meaning; ...

'contract'-

(a) means a deed of alienation under which land is sold against payment by the purchaser to, or to any person on behalf of, the seller of an amount of money in more than two instalments over a period exceeding one year; ...

'deed of alienation' means a document or documents under which land is alienated; ...

CHAPTER I

FORMALITIES IN RESPECT OF DEEDS OF ALIENATION ...

2 Formalities in respect of alienation of land

(1) No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.

(2) The provisions of subsection (1) relating to signature by the agent of a party acting on the written authority of the party, shall not derogate from the provisions of any law relating to the making of a contract in writing by a person professing to act as agent or trustee for a company not yet formed, incorporated or registered.

(2A) The deed of alienation shall contain the right of a purchaser or prospective purchaser to revoke the offer or terminate the deed of alienation in terms of section 29A ...

CHAPTER II

SALE OF LAND ON INSTALMENTS ...

6 Contents of contract

(1) A contract shall contain-

- (a) the names of the purchaser and the seller and their residential or business addresses in the Republic;
- (b) the description and extent of the land which is the subject of the contract;
- (c) if the seller is not the owner of the land, the name and address of that owner;
- (d) if the land is encumbered by a mortgage bond, the name and address of the person, or his representative or, in the case of a participation bond, the name and address of the nominee company, or its representative, in favour of whom the mortgage bond over the land is registered at the time the contract is concluded;
- (e) the amount of the purchase price;
- (f) the annual rate at which interest, if any, is to be paid on the balance of the purchase price;
- (g) the amount of each instalment payable under the contract in reduction or settlement of the purchase price and interest (if any);
- (h) the due date or the method of determining the due date of each instalment;
- (i) if the land is sold by an intermediary, the name and address of every other intermediary who alienated the land prior to the date the contract is concluded;
- (j) the amount or amounts of any transfer duty (if any) payable in terms of the Transfer Duty Act, 1949 (Act 40 of 1949), in respect of the land, and the name of the person or persons by whom such duty is to be paid;
- (k) the dates on which and the conditions on which the purchaser shall be entitled to take possession and occupation of the land;

- (l) the place where the payments shall be made;
- (m) the date on which the risk, profit and loss of the land shall pass to the purchaser;
- (n) a statement of the obligation (if any) of the purchaser to insure the subject matter of the contract;
- (o) a statement-
 - (i) of any amount which in terms of any law is payable in respect of the land as endowment, betterment or enhancement levy, a development contribution or any similar imposition and an indication of the person to and the person by whom it is so payable; and
 - (ii) that no amount contemplated in subparagraph (i) is payable in respect of the land, if such is the case; ...
- (p) an indication of the party who shall be liable for the payment of the costs of-
 - (i) the drafting of the contract;
 - (ii) the recording thereof in terms of section 20; and
 - (iii) the transfer of the land;
- (q) if the land is not the subject of a separate title deed at the time the contract is concluded, the latest date at which the land shall be registrable in the name of the purchaser;
- (r) if the seller is the owner of the land, an undertaking by him that the land shall not be encumbered or further encumbered by a mortgage bond on or before the date on which the contract is recorded in terms of section 20;
- (s) the period within which the purchaser is obliged or may be compelled to take transfer of the land against simultaneous payment of all amounts owed by him in terms of the contract;
- (t) a reference to-
 - (i) the right of a purchaser under section 11 to perform the obligations of the owner or an intermediary;

- (ii) the right of the purchaser under section 17 to accelerate payments in terms of the contract and to claim transfer of the land against simultaneous payment of all the amounts payable by him to the seller in terms of the contract;
- (iii) the right of the purchaser under section 20 to have the contract recorded;
- (iv) the rights and remedies of the purchaser under sections 13 (2), 16 (3), 23 and 27;
- (v) the obligation of the purchaser-
 - (aa) in terms of section 9 to give the information referred to in that section to any mortgagee;
 - (bb) in terms of section 15 (2) to accept a mortgage bond arranged in terms of that section on his behalf;
 - (cc) in terms of section 21 (1) to give the information referred to in that section to the owner of the land;
- (vi) the limitation in terms of section 19 of the right of the seller to take action by reason of any breach of contract on the part of the purchaser.

(2) The date which is stated in a contract in terms of subsection (1) (m), shall not be earlier than the date which is stated therein in terms of subsection (1) (k) as the date on which the purchaser shall be entitled to take possession of the land.

(3) The aggregate amount of the instalments referred to in subsection (1) (g) which are to be paid during any of successive periods of 12 months following on the date of the contract, shall not be less than the interest which, in terms of the contract, would become payable during that period if all instalments were paid timeously.

(4) The date stated in a contract in terms of subsection (1) (q), shall not be later than five years from the date of the contract.

(5) If for whatever reason the seller is unable, after the date referred to in subsection (4), to tender transfer of the land against simultaneous payment of all the amounts payable to him by the purchaser in terms of the contract, the purchaser may cancel the contract, in which event the parties shall be entitled to the relief provided for in section 28 (1), or the purchaser may abide by the contract, in which event no interest shall be payable by him in terms of the contract as from the date in question until such time as such transfer is

tendered: Provided that this subsection shall not detract from any additional claim for damages which the purchaser may have.

28 Consequences of deeds of alienation which are void or are terminated

(1) Subject to the provisions of subsection (2), any person who has performed partially or in full in terms of an alienation of land which is of no force or effect in terms of section 2(1), or a contract which has been declared void in terms of the provisions of section 24(1)(c), or has been cancelled under this Act, is entitled to recover from the other party that which he has performed under the alienation or contract, and-

(a) the alienee may in addition recover from the alienator-

(i) interest at the prescribed rate on any payment that he made in terms of the deed of alienation or contract from the date of the payment to the date of recovery;

(ii) a reasonable compensation for-

(aa) necessary expenditure he has incurred, with or without the authority of the owner or alienator of the land, in regard to the preservation of the land or any improvement thereon; or

(bb) any improvement which enhances the market value of the land and was effected by him on the land with the express or implied consent of the said owner or alienator; and

(b) the alienator may in addition recover from the alienee-

(i) a reasonable compensation for the occupation, use or enjoyment the alienee may have had of the land;

(ii) compensation for any damage caused intentionally or negligently to the land by the alienee or any person for the actions of whom the alienee may be liable.

(2) Any alienation which does not comply with the provisions of section 2 (1) shall in all respects be valid ab initio if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee ...

General Law Amendment Act 50 of 1956

6 No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety ...

ENGLAND

Law of Property Act 1925

40(1) No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised.

(2) This section applies to contracts whether made before or after the commencement of this Act and does not affect the law relating to part performance, or sales by the court.

Law of Property (Miscellaneous Provisions) Act 1989

2(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.

(2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.

(3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract.

(4) Where a contract for the sale or other disposition of an interest in land satisfies the conditions of this section by reason only of the rectification of one or more documents in pursuance of an order of a court, the contract shall come into being, or be deemed to have come into being, at such time as may be specified in the order.

(5) [N]othing in this section affects the creation or operation of resulting, implied or constructive trusts.

Statute of Frauds 1677

4 No action shall be brought ... whereby to charge the Defendant upon any special promise to answer for the debt, default or miscarriage of another person ... unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised.

GERMANY**German Civil Code (BGB)****§ 125 Voidness resulting from a defect of form**

A legal transaction that lacks the form prescribed by statute is void. In case of doubt, lack of the form specified by legal transaction also results in voidness.

§ 126 Written form

(1) If written form is prescribed by statute, the document must be signed by the issuer with his name in his own hand, or by his notarially certified initials.

(2) In the case of a contract, the signature of the parties must be made on the same document. If more than one counterpart of the contract is drawn up, it suffices if each party signs the document intended for the other party.

(3) Written form may be replaced by electronic form, unless the statute leads to a different conclusion.

(4) Notarial recording replaces the written form.

§ 311b Contracts on plots of land, assets and an estate

(1) A contract by which one party agrees to transfer or acquire ownership of a plot of land must be recorded by a notary. A contract not entered into in this form becomes valid with

all its contents if a declaration of conveyance and registration in the Land Register are effected ...

§ 766 Written form of the declaration of suretyship

For the contract of suretyship to be valid, the declaration of suretyship must be issued in writing. The declaration of suretyship may not be made in electronic form. If the surety discharges the main obligation, the defect of form is remedied.

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